Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

ROBERT LEE MASSIE,

*Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of California**

## PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE
## QUESTIONS PRESENTED

Petitioner pled guilty to felony murder in 1979. He was sentenced to death, and began serving his sentence on San Quentin's death row. His motion to dismiss the automatic appeal required by California law was denied, as was his federal petition for writ of habeas corpus to prevent the California Supreme Court from hearing the unwanted appeal. In 1985 the California Supreme Court reversed petitioner's conviction on the ground that his guilty plea was invalid under California law. In 1989 he was tried and convicted a second time, based upon the same information, and again was sentenced to death. On appeal, the California Supreme Court rejected petitioner's claim that the second trial and death sentence were barred by the double jeopardy clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, on the grounds that federal constitutional jeopardy never attaches where a guilty plea is held invalid on appeal pursuant to state law.

The questions presented are:

1) Has jeopardy attached for purposes of the Fifth and Fourteenth Amendments where a capital defendant's guilty plea has been unconditionally accepted and entered by the trial court, sentence has been pronounced, and the condemned has been confined for several years awaiting execution pursuant to the sentence?

2) Is a defendant subjected to double jeopardy pursuant to the Fifth and Fourteenth Amendments where (i) he pleads guilty to felony murder and is sentenced to

## QUESTIONS PRESENTED – Continued

death by a court with undisputed jurisdiction over the crime and his person, (ii) his conviction is then reversed on state law grounds in a state-initiated automatic appeal which he was denied the right to terminate in state and federal court, and (iii) he is tried a second time on the same information for the same felony murder?

## LISTING OF PARTIES TO THE PROCEEDING

The caption to this case contains the names of all parties.

## RULE 29.6 STATEMENT

No corporations are parties to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Robert Lee Massie respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court.

## OPINIONS BELOW

The decision of the Supreme Court of California is reported at 19 Cal.4th 550 (1998). (App., *infra*, pp. 1-41.)

## JURISDICTION

The decision and judgment of the Supreme Court of California was filed November 30, 1998. (App., *infra*, p. 1.) On February 19, 1999, Justice O'Connor extended petitioner's time in which to file this petition up to and including March 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Const. Amend. 5**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

> of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. Amend. 14**

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## INTRODUCTION

According to the United States Sentencing Commission, nearly ninety percent of all federal criminal cases culminate in a guilty plea. *United States v. Dethlefs*, 123 F.3d 39, 47 (1st Cir. 1997). Eighty to ninety percent of all state criminal cases end the same way. *In re Alvernaz*, 2 Cal.4th 924, 933 (1992).

If the California Supreme Court's opinion in this case correctly states the law, hundreds of these defendants will be astonished to learn, as they serve their sentences in the nation's penitentiaries – even on the nation's death rows – that they are not in constitutional jeopardy, and

therefore not safe from a second trial, conviction and sentence on the same charge.

According to the California Supreme Court, if an appellate court, even years after a defendant's conviction, finds that his guilty plea was invalid under ***state*** law, jeopardy for federal constitutional purposes has never attached, and the state may retry the defendant.

Thus, if the California Supreme Court is correct, the protection of the Double Jeopardy Clause is entirely dependent upon the vagaries of the laws of the fifty states, and the Clause means something different in each state. In other words, had the events at issue in this case happened in most other states, federal constitutional jeopardy would have attached, and the petitioner's retrial would have been barred by the Double Jeopardy Clause; but in California, federal constitutional jeopardy never attached, and the petitioner may be retried, convicted and executed.

The California Supreme Court is wrong. The Double Jeopardy Clause knows no state lines.

Petitioner Robert Lee Massie ("Massie") pled guilty to felony murder in 1979 and was sentenced to death. When he learned that the State of California had initiated an appeal of his conviction, nominally in his name, he tried to dismiss it. When his motion was denied, he asked the federal courts to intervene and block the appeal. Again, denied. Massie repeatedly insisted, both before the state and federal courts, that he did not waive his double jeopardy rights, and if the California Supreme Court reversed his conviction over his objections, any retrial would be jeopardy-barred.

The California Supreme Court reversed Massie's conviction over his objections in 1985. Massie asked the court to rehear the case, vacate the reversal, and reinstate the trial court's judgment, again asserting his double jeopardy right to avoid the strain of a second trial. The court refused. Massie tried, both in state and federal court, to block his retrial on double jeopardy grounds, again without success. In 1989, Massie endured another murder trial, an ordeal that he had a constitutional right to avoid, and was again convicted and sentenced to death.

On appeal to the California Supreme Court, Massie argued that his 1989 retrial was barred by the double jeopardy clause of the Fifth Amendment. He demonstrated that he had done nothing during his years on death row which could remotely be construed as a "waiver" of his double jeopardy rights: indeed, he had asserted those rights at every opportunity. Further, he showed that no societal interest in a "reliable" death penalty process could outweigh his Fifth Amendment rights.

But the California Supreme Court ruled that Massie had never been in jeopardy in connection with his first conviction. Not when a court with undisputed jurisdiction over the crime and his person determined that a sufficient factual predicate existed and unconditionally accepted his guilty plea. Not during the sentencing phase of his trial for capital murder. Not when the Superior Court judge sentenced him to die in the gas chamber. Not when he spent six years pursuant to that judgment sitting on death row, awaiting execution.

The California Supreme Court erred. The court looked to state law to determine whether jeopardy had attached and held that jeopardy never attaches where a guilty plea is invalid under state law. This Court has clearly held that Federal law governs the question of when jeopardy attaches, so the validity of a plea under state law is irrelevant. This Court, several circuits and several state courts of last resort have held that jeopardy attaches where a guilty plea is unconditionally accepted and judgment is entered by a court with jurisdiction over the crime and the person of the defendant.

The California Supreme Court's decision is in clear conflict with a century of double jeopardy jurisprudence from this Court, several Circuits and several state courts of last resort. This Court should grant the petition for writ of certiorari and reverse the judgment.

## STATEMENT OF THE CASE

### A. MASSIE'S 1979 CONVICTION AND DEATH SENTENCE

On January 3, 1979, Massie shot and killed Boris Naumoff, the proprietor of a San Francisco liquor store. Massie was arrested two days later. The San Francisco District Attorney filed an eight count information on February 20, 1979, charging Massie with, among other things, murder and robbery. Massie pled not guilty to all charges and special circumstances.

The cause came on regularly for trial on May 7, 1979. Massie made a motion to suppress his alleged confession

on the ground that it was involuntarily given. After a brief hearing, Massie's motion was denied.

Massie then requested a conference in chambers to withdraw his previous pleas, and instead to plead guilty to all charges and special circumstances. After a discussion with Massie's counsel, the court preliminarily accepted Massie's guilty pleas. After reviewing testimony, the court found that a sufficient factual predicate existed for accepting the pleas. After the pleas were entered, Massie discharged his attorneys. He sought and received permission to act as his own counsel. After a brief penalty phase, Massie was sentenced to death for felony murder on May 25, 1979.

Because Massie was sentenced to death, the clerk of the trial court was required, pursuant to California Penal Code §1239(b), to enter an appeal automatically. By letter dated June 1, 1979, Massie was informed that an automatic appeal of his conviction and sentence had been filed in his name before the California Supreme Court. Massie's consent was never sought or given for the filing of this appeal.

## B. MASSIE'S EFFORTS TO TERMINATE THE AUTOMATIC APPEAL

On June 11, 1979, proceeding *in propria persona*, Massie filed a Motion to Abandon and Dismiss Appeal. In support of his motion, Massie argued that the determination by the California Supreme Court of the § 1239(b) proceeding over his objections would violate the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the

United States Constitution as well as the California Constitution. Massie explicitly waived any errors which might have occurred in his trial, stated he was abandoning the appeal, and requested that judgment be executed forthwith. The California Supreme Court denied Massie's motion without opinion on June 27, 1979.

Massie then sought vindication of his constitutional rights in the federal courts. On July 9, 1979, he filed a Petition for Writ of Habeas Corpus before the United States District Court for the Northern District of California. There, he asserted that Penal Code § 1239(b) was unconstitutional as applied pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the California Constitution. Massie asked that the district court restrain the California Supreme Court from hearing the automatic § 1239(b) appeal and require the court to grant Massie's Motion to Abandon and Dismiss.

The District Court denied the petition. The United States Court of Appeals for the Ninth Circuit affirmed the decision, and this Court denied a petition for writ of certiorari. *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981).

By letter dated April 7, 1983, Massie instructed the Public Defender who had been appointed, over his objections, to represent him during the § 1239(b) proceeding that he should argue to the California Supreme Court that it lacked jurisdiction to reverse Massie's conviction over his objections, and that any retrial pursuant to such a reversal would violate the double jeopardy provisions of

the Federal and California constitutions. The Public Defender refused to follow Massie's instructions.

Next, by letter dated December 2, 1984, Massie informed the California Supreme Court that he had retained separate counsel to represent him in the hearing on the § 1239(b) appeal. Massie requested that the court grant his counsel time on oral argument equal to that granted the Public Defender, who was seeking reversal of Massie's conviction over Massie's objections. Massie's letter informed the Court that his retained counsel would argue that the Court lacked jurisdiction to reverse his conviction over his objections, and that any retrial pursuant to such a reversal would be barred by double jeopardy. No action was taken on Massie's request. On December 23, 1985, the California Supreme Court reversed Massie's murder conviction and death sentence on grounds that his guilty plea was invalid under state law. *People v. Massie*, 40 Cal.3d 620 (1985).

On January 8, 1986, Massie, *in propria persona*, filed a Petition for Rehearing and/or motion to Vacate Decision on Appeal and Reinstate the Original Judgment. Massie once again pointed out to the Court that he had not waived his double jeopardy and due process rights, and that if the Court insisted on reversing his conviction over his objection, any retrial would be jeopardy barred. Massie's motion was denied without opinion.

## C. MASSIE'S SECOND TRIAL, CONVICTION AND DEATH SENTENCE

The People then sought to reprosecute Massie, refiling the same information filed against him in 1979. On

October 20, 1986, Massie filed a motion to vacate and dismiss the information on double jeopardy grounds, together with a statutory plea of former judgment of conviction and once in jeopardy. The motion was heard and denied on November 12, 1986.

Massie filed a petition for writ of mandate in the California Court of Appeal, but relief was denied without opinion on January 20, 1987. Massie then sought review from the California Supreme Court, but review was denied on March 5, 1987.

On June 29, 1987, Massie again sought relief from the federal courts, filing a petition for writ of habeas corpus in the United States District Court for the Northern District of California challenging his retrial on double jeopardy grounds. The District Court denied the petition on December 28, 1987, and the Ninth Circuit affirmed on May 23, 1989. *Massie v. Hennessey*, 875 F.2d 1386 (9th Cir. 1989), *cert. denied*, 494 U.S. 1039 (1990).

The guilt phase of Massie's second trial began January 25, 1989, and the jury returned guilty verdicts on all charges on February 19, 1989. Pursuant to the jury's recommendation, the trial court sentenced Massie to death on June 8, 1989.

## D. THE CALIFORNIA SUPREME COURT'S DECISION

On appeal Massie raised several constitutional challenges to the judgment. Massie argued that his 1989 retrial was barred by the double jeopardy clauses of the United States and California constitutions. Massie

pointed out that constitutional jeopardy attached in 1979 when his guilty plea was unconditionally accepted and entered by a trial court with undisputed jurisdiction over the crime and his person. Nothing about the 1985 automatic appeal, which Massie had sought in state and federal court to terminate, justified a finding that Massie had waived or otherwise lost his double jeopardy rights. Massie also challenged his conviction on Sixth Amendment and Equal Protection grounds.

The California Supreme Court affirmed the judgment. The Court found that, despite having been confined on death row for several years awaiting execution pursuant to the 1979 conviction, Massie was never in constitutional jeopardy because his guilty plea was invalid pursuant to California law. (*App.*, pp. 11-13.) The Court also held that Massie had no constitutional right to withdraw the state-mandated appeal, and that the automatic appeal statute did not violate the Equal Protection Clause because it applied to all capital defendants. (*App.*, pp. 16-19, 24.)

## REASONS FOR GRANTING THE WRIT

This Court has held that the Double Jeopardy Clause of the Fifth Amendment provides three fundamental protections: it protects against retrial following acquittal, it protects against retrial following conviction, and it protects against multiple punishments for a single offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984). The Court emphasized in *Abney v. United States*, 431 U.S. 651, 660-61 (1977) that, at bottom, the Double Jeopardy Clause is a

protection against being required to stand trial twice on the same charge. *See United States v. Wilson*, 420 U.S. 332, 345-46 (1975). The Court has recognized that an integral part of the Double Jeopardy Clause is the defendant's "valued right to have his trial completed by a particular tribunal," *Crist v. Bretz*, 437 U.S. 28, 36 (1978), a right "with roots deep in the historic development of trial by jury." *Ibid.*

## A. THE DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CRIST V. BRETZ* AND AT LEAST TWO DECISIONS BY THE CIRCUIT COURTS WHICH HOLD THAT THE LAW APPLICABLE TO THE ATTACHMENT OF JEOPARDY IS FEDERAL, NOT STATE

The issue of when jeopardy attaches is " 'the linchpin for all double jeopardy jurisprudence.' " *Crist v. Bretz*, 437 U.S. at 38. The California Supreme Court looked to state law to determine whether jeopardy attached during Massie's 1979 trial, finding that jeopardy had not attached because Massie's 1979 guilty plea was invalid as a matter of state law.

The California Supreme Court's decision conflicts with this Court's decision in *Crist v. Bretz, supra*, 437 U.S. 28, where this Court held that the federal standards regarding when jeopardy attaches are applicable to the states through the Fourteenth Amendment. *Id.* at 38. Both the Second and Seventh Circuits have agreed that courts must look to federal law, not state law, to determine whether jeopardy has attached in a proceeding. *Boyd v. Meachum*, 77 F.3d 60, 65 (2nd Cir. 1996); *Kennedy v. Washington*, 986 F.2d 1129, 1134 (7th Cir. 1993).

## B. THE DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT, THE CIRCUITS, AND THE STATE COURTS OF LAST RESORT, WHICH HOLD THAT JEOPARDY ATTACHES WHEN A GUILTY PLEA IS UNCONDITIONALLY ACCEPTED BEFORE A TRIBUNAL WITH JURISDICTION OVER THE CRIME AND THE DEFENDANT'S PERSON

Having begun by looking to state law rather than federal law to determine whether jeopardy attached during Massie's 1979 trial, the California Supreme Court then erred again by choosing the wrong standard, placing itself in conflict with long-established standards set by this Court and followed by the federal circuit courts of appeals and state courts of last resort.

The California Supreme Court implicitly decided that the attachment of jeopardy depends upon the validity under state law of the court's judgment. Because an invalid guilty plea leads to a void judgment, the court found, jeopardy never attaches, even where the defendant has suffered years of confinement on death row pursuant to the "void" judgment.

However, the existence of jeopardy is not dependent upon the validity of the judgment. "Jeopardy denotes risk," this Court held in *Breed v. Jones*, 421 U.S. 519, 528 (1975). "In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." Thus, when determining whether jeopardy has attached, the inquiry focuses upon the proceeding, not the judgment: "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate

public justice.' " *Id.* at 529. As the Court wrote in *Price v. Georgia*, 398 U.S. 323, 331 (1970), "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly."

This Court described the proper standard for attachment of jeopardy more than a century ago in *Ball v. United States*, 163 U.S. 662, 669-670 (1896). There, the Court held that jeopardy attached in a trial where the indictment was fatally defective:

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. But, although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided cannot be collaterally impeached.

(Internal citations omitted.) The Court reaffirmed that jeopardy attached so long as the court had subject matter and personal jurisdiction in *Grafton v. United States*, 206 U.S. 333, 345-46 (1907).

In *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), the lower court had ordered a directed verdict of acquittal on grounds of prosecutorial misconduct. The government argued that the court lacked the authority to direct the verdict under the circumstances, making the judgment void. This Court held that jeopardy had attached

during the aborted proceeding: "[t]he petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter." *Id.* at 143. Thus, double jeopardy barred retrial.

This Court reaffirmed the *Ball* rule once again in *Benton v. Maryland*, 395 U.S. 784, 796-97 (1969), where the Court found that jeopardy had attached during a previous trial even where the indictment was "absolutely void." The Court reaffirmed the same point implicitly in *Illinois v. Somerville*, 410 U.S. 458 (1973). There, the trial court discovered, mid-trial, that the charge failed to state an essential element of the crime. Since this caused a "lack of jurisdiction" under Illinois state law, the trial court declared a mistrial. When the state sought to retry the defendant, he asserted double jeopardy. On appeal, the Supreme Court focused on whether the mistrial was justified by "manifest necessity," thus implicitly holding or assuming that jeopardy had attached when the jury was sworn. *Id.* at 465.

Numerous circuit courts and state courts of last resort have applied this Court's teachings, frequently in situations where one party claimed that the court's judgment in the first proceeding was void.

In *Boyd v. Meachum*, 77 F.3d at 65, the Second Circuit held that in order to demonstrate that jeopardy could not have attached in a previous proceeding, a party must show "not merely that the criminal court did not properly exercise jurisdiction over [the defendant's] person as a matter of state law, but rather than the court could not

exercise personal jurisdiction over [the defendant] without violating the Constitution, or perhaps other federal law depriving the state court of personal jurisdiction."

The Second Circuit had earlier decided *United States v. Sabella*, 272 F.2d 206 (2nd Cir. 1959). There, the United States Attorney claimed that jeopardy could not have attached to a previous conviction, since the statute under which the defendants had been convicted and sentenced did not at that time authorize imposition of any punishment, and the judgment was thus a nullity. The Second Circuit flatly rejected the notion that jeopardy could not attach in a situation where the defendant had been imprisoned pursuant to a judgment: "There is some degree of unreality in a claim that a convicted defendant who has been in jail has not been in jeopardy. Indeed, such a contention has been characterized as 'in the vein of The Mikado.' " *Id.* at 208-09.

The defendant in *Block v. State*, 407 A.2d 320 (Md. 1979) had been found guilty in a bench trial. Before sentencing, the court reconsidered its verdict and entered a verdict of not guilty. The following month, the court set aside its verdict and ordered a new trial at the prosecutor's request. When the defendant invoked double jeopardy, the State argued that the court had lacked jurisdiction to set aside its guilty verdict and enter a not guilty verdict, and the acquittal was therefore a nullity for double jeopardy purposes. The Maryland Court of Appeals disagreed:[1]

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[1] Under Maryland law, the Court of Appeals is the state court of last resort.

> [I]t is clear from *Grafton*, and from many other cases, that the 'jurisdiction' of the court for purposes of this principle of double jeopardy law means jurisdiction in the most basic sense. It does not mean that an error in the exercise of jurisdiction permits judicial proceedings to be treated as a nullity.

*Id.* at 322. As long as the lower court had jurisdiction over the offense and the person of the defendant, jeopardy attached, and retrial was barred. *Id.* at 324.

In *Commonwealth v. Diaz*, 477 Pa. 122, 383 A.2d 852 (Pa. 1978), a defendant had pled guilty and been sentenced in a prior proceeding where no indictment had ever been returned. The government argued that jeopardy could not attach under such circumstances, but the Pennsylvania Supreme Court held that, because the trial court had subject matter jurisdiction, jeopardy had attached, and retrial was barred. 477 Pa. at 124-26, 383 A.2d at 854.

In *Markiewicz v. Black*, 138 Colo. 128, 330 P.2d 539 (1958), the petitioners had been indicted, arraigned and pled guilty to charges of assault and robbery. After an offer of proof by the district attorney, the court found that the evidence did not support the guilty pleas and dismissed the case. 138 Colo. at 130-31, 330 P.2d at 540. When the district attorney attempted to retry the petitioners, the Colorado Supreme Court held that retrial was barred because the previous proceeding had placed the petitioners in jeopardy:

> [I]t is not ordinarily necessary that the prior trial shall have resulted in a valid judgment either of

> conviction or acquittal; it is sufficient if the prisoner was actually placed in jeopardy in that he was in danger of having a valid judgment pronounced as a result of the trial; it is not the verdict or judgment which places a prisoner in jeopardy.

138 Colo. at 132, 330 P.2d at 541.[2] *Id.*

Ironically, the California Supreme Court recognized the same principle in *People v. Superior Court (Marks)*, 1 Cal.4th 56 (1991). In the first appeal of the defendant's conviction, the court had reversed because the lower court had failed to hold a competency hearing, writing that, under such circumstances, the court "lacks jurisdiction" to proceed without a finding of competence. *Id.* at 64. On remand, when the defendant claimed that double jeopardy prevented a new trial, the government argued that the earlier proceedings had been without jurisdiction and void, and jeopardy had therefore not attached. *Id.* at 63. The California Supreme Court disagreed, holding that, for purposes of double jeopardy analysis, the crucial distinction was between a "fundamental" loss of jurisdiction, i.e., " 'an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties,' " and "an inability 'to act except in a particular manner, or to give certain kinds of relief, or

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[2] Although it appears that the petitioners in *Markiewicz* may have invoked only the state constitutional double jeopardy provision, 138 Colo. at 131, 330 P.2d at 541, the court decided the case pursuant to general double jeopardy authority, citing cases from a number of different states, not Colorado law. 138 Colo. at 132-34, 330 P.2d at 541-43.

to act without the occurrence of certain procedural prerequisites.' " *Id.* at 66. A "fundamental" loss of jurisdiction was necessary to prevent the attachment of jeopardy, the court held, and none had occurred: "Although the judgment may be a nullity, for double jeopardy purposes the proceedings are not." *Id.* at 70-71.

Since the cases clearly show that the attachment of jeopardy does not await an ultimate appellate determination as to the validity of the judgment,[3] whether the

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[3] The California Supreme Court cited only three authorities in support of its holding that jeopardy is suspended in cases involving guilty pleas until the appellate court decides whether the plea is valid under state law. The Court relied heavily upon *Cox v. State*, 412 So.2d 354, 356 (Fla. 1982), where the Supreme Court of Florida decided in a non-capital case without analysis or explanation that jeopardy had not attached in a proceeding involving a guilty plea which was invalid under state law. The Florida Supreme Court encountered the same question the following year in *Lisak v. State*, 433 So.2d 487 (Fla. 1983), again holding that a guilty plea which was invalid under state law did not cause jeopardy to attach, this time over a written dissent arguing that, so long as the court's subject matter and personal jurisdiction were undisputed, jeopardy attached. *Cox* and *Lisak* are wrongly decided for the reasons described above – the court applied state, not Federal law to the question of when jeopardy attached, and focused on the validity of the judgment, not the moment when the defendant was subjected to the risk which this Court has defined as jeopardy. The California Supreme Court also cited 22 C.J.S. Criminal Law, § 223, p. 272 as support for its analysis. The C.J.S. Annotation cites only a lower court case from New York, *People v. Shiu Yan Yee*, 114 Misc.2d 515, 451 N.Y.S.2d 965 (N.Y. 1982), which repeats the same error, again without analysis. The Georgia Court of Appeal repeated the same error in *State v. Dawson*, 203 Ga.App. 854, 419 S.E.2d 30 (Ga. 1992), implicitly deciding that jeopardy does not attach where a guilty plea is invalid under state law. The California

judgment arose from a guilty plea or a jury verdict, the question remains: at what point during the proceedings does jeopardy attach?

The answer lies in this Court's definition of constitutional jeopardy: "[J]eopardy describes the risk that is traditionally associated with a criminal prosecution," this Court held in *Breed v. Jones*, 421 U.S. at 528. As the Court wrote in *Price v. Georgia*, 398 U.S. at 331, "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict."

Plainly, a defendant who pleads guilty has encountered the risk that is traditionally associated with a criminal prosecution, since he has waived trial and suffered conviction – even more so where he has been sentenced on his plea: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). This is no less true if his guilty plea is eventually held invalid pursuant to state law, whether upon his own appeal, or upon a state-mandated appeal prosecuted over his vigorous opposition.

Thus, it is not surprising that eleven Federal circuits have held that jeopardy attaches either upon acceptance

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Supreme Court also cited *Bayless v. United States*, 147 F.2d 169, 170 (8th Cir. 1945), but *Bayless* does not mention the issue of attachment of jeopardy to a guilty plea which was invalid under state law and did not involve an automatic appeal. Since the defendant in *Bayless* had sought appellate review by habeas petition, the court held that he could be retried.

of a guilty plea, or upon sentencing on the plea; not one has suggested that jeopardy is held in abeyance through the end of an appellate proceeding while the validity of the defendant's plea under state law is decided. *United States v. Santiago Soto*, 825 F.2d 616, 618-19 (1st Cir. 1987); *United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2nd Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Felton*, 753 F.2d 276, 278 (3rd Cir. 1985); *Burgess v. Griffin*, 743 F.2d 1064, 1065 (4th Cir. 1984); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 & n.9 (5th Cir. 1987), *cert. denied*, 483 U.S. 1008; *Riadon v. United States*, 274 F.2d 304, 306 (6th Cir. 1960), *cert. denied*, 364 U.S. 896; *U.S. ex rel. Stevens v. Circuit Court*, 675 F.2d 946, 948 (7th Cir. 1982); *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir. 1978) (dicta), *cert. denied*, 439 U.S. 967; *United States v. Faber*, 57 F.3d 873, 875 (9th Cir. 1995); *United States v. Combs*, 634 F.2d 1295, 1298 (10th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981); *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990), *cert. denied*, 498 U.S. 862. Many state courts of last resort have agreed. *E.g., Ex Parte Wright*, 477 So.2d 492, 493 (Ala. 1985); *State v. McAlear*, 519 N.W.2d 596, 599 (S.D. 1994); *State v. Comstock*, 168 Wis.2d 915, 937-38, 485 N.W.2d 354, 362-63 (Wis. 1992).

Courts have ruled similarly in connection with motions for new trial in criminal cases. In *Powell v. District Court*, 473 P.2d 254, 256-57 (Ok. 1970), the defendant had pled guilty, been sentenced, and filed his notice of intent to appeal. On the State's motion, the trial court then vacated the judgment and sentence. The Oklahoma Court of Criminal Appeals (a state court of last resort) held that retrial was jeopardy-barred, and gave no indication that any possible error in the plea or sentence was

relevant to the analysis. Similarly, in *Hopkinson v. State*, 679 P.2d 1008, 1032 (Wyo. 1984), the Supreme Court of Wyoming indicated that permitting trial courts to grant new trials on their own motion would raise serious double jeopardy concerns. This Court agreed a half century ago in *United States v. Smith*, 331 U.S. 469, 474-75 (1947). The Advisory Committee Notes to the 1966 Amendment to Rule 33 of the Federal Rules of Criminal Procedure also note that serious double jeopardy concerns would be raised by permitting motions for new trial by anyone other than the defendant, a view in conflict with the California Supreme Court's judgment here. Advisory Committee Notes, Fed. R. Crim. Proc. 33, 1966 Amendment, 18 U.S.C.A. (1976 ed.), p. 192.

Massie was placed at "risk or hazard of trial or conviction," *Price v. Georgia*, 398 U.S. at 331, and subjected to "the risk that is traditionally associated with a criminal prosecution," *Breed v. Jones*, 421 U.S. at 528, in 1979. After a hearing on the admissibility of his purported confession, during which he testified, he pled guilty to felony murder and requested a penalty trial. The Court preliminarily accepted Massie's guilty plea, and after reviewing testimony, found that a sufficient factual predicate existed for accepting the plea. Massie was then subjected to the penalty phase of the trial, which lasted several days, during which he acted as his own counsel. At the conclusion of the penalty phase, Massie was sentenced to death. He then served six years on death row before the court's judgment and sentence were reversed over his objections.

The California Supreme Court's holding that Massie was not placed in jeopardy by the 1979 judgment and death sentence based upon his guilty plea is contrary to a

host of decisions by this Court, each of the Circuits, and many state courts of last resort. This Court should grant this petition for writ of certiorari to resolve the conflict and reverse the California Supreme Court's decision.

## C. MASSIE'S 1989 RETRIAL WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE

In view of this Court's decisions, jeopardy certainly attached during Massie's 1979 trial. However, "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville*, 410 U.S. at 467. Although the California Supreme Court, led astray by its erroneous conclusion that jeopardy did not attach in Massie's 1979 trial, never reached this point in the analysis, the standards set by this Court over the years demonstrate that Massie's retrial was barred by double jeopardy.

### 1. Massie's Double Jeopardy Rights Cannot Be Abrogated By Imputing The Coerced 1985 Appeal to Him

It has long been settled that a defendant may be retried after he has appealed his conviction and secured reversal. As Justice Harlan explained in *United States v. Tateo*, 377 U.S. 463, 466 (1964), permitting retrial after a defendant successfully appeals his conviction balances the defendant's right to an error-free trial against the state's right to an opportunity to punish individuals who break the law after such a trial: essentially, a defendant cannot be heard to complain if he receives the appellate review he asked for.

But the automatic appellate proceeding forced on capital defendants under California law cannot reasonably be described as the "defendant's" appeal, so this analysis cannot justify Massie's retrial. The appeal is automatically initiated without the defendant's permission. *Cal. Penal Code § 1239(b)*. The defendant may not terminate the appeal. *People v. Stanworth*, 71 Cal.2d 820, 832-34 (1969). Indeed, he may not even determine for himself the goals of the appeal: when Massie instructed undersigned counsel not to argue any issue during his 1998 appeal for which the proper remedy was a third trial, the California Supreme Court entered an order directing counsel to disregard Massie's wishes and argue such issues anyway. *See People v. Massie*, App., *infra* at pp. 30-40; *People v. Stanworth*, 71 Cal.2d at 835 (capital defendant may not dismiss counsel who insists on arguing trial errors which will lead to retrial contrary to defendant's wishes).[4]

### 2. Massie's Double Jeopardy Rights Cannot Be Outweighed By Any Purported Societal Interest

Nor can this Court's cases support the conclusion that Massie's double jeopardy rights are outweighed by any societal interest, including the state's purported

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[4] Thus, at each step along the way, the California courts have denied Massie his right, protected by the Sixth and Fourteenth Amendments, to control his own defense. *Faretta v. California*, 422 U.S. 806, 819-21, 834 (1975); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see Godinez v. Moran*, 509 U.S. 383, 399 (1993).

interest in avoiding the arbitrary and capricious imposition of the death penalty.

First, as a matter of law, where the defendant has not initiated an appeal, double jeopardy rights cannot, as a matter of law, be overridden by a countervailing public interest. "[W]hen the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States*, 437 U.S. 1, 11, n.6 (1978).

Second, although avoiding imposing the death penalty in an arbitrary and capricious manner is a commendable goal, this Court has never held, or so much as implied, that achieving that goal requires the mandatory, non-waivable review not only of capital sentences, but of capital convictions as well. The Georgia death penalty statute upheld in *Gregg v. Georgia*, 428 U.S. 153, 166 (1976), for example, requires mandatory appellate review only of a capital sentence, not a conviction. Plainly, any interest the state might have in mandatory review of capital convictions is not sufficient to overcome Massie's double jeopardy rights.

Nor does the proposition that the double jeopardy clause did not bar Massie's retrial because the 1985 mandatory, non-waivable appeal was in Massie's interest withstand analysis. This Court rejected that proposition in *United States v. Jorn*, 400 U.S. 470, 483 (1971), where it held that a new trial was barred by double jeopardy after a mistrial had been declared without the defendant's consent, but for the defendant's sole benefit.

### 3. The Theory of "Continuing Jeopardy" Cannot Justify Massie's Retrial

Nor can Massie's retrial be justified by the proposition that his jeopardy "continued" from the 1979 trial through the involuntary 1985 appeal and the 1989 retrial. The theory of "continuing jeopardy" was first proposed in 1904 by Justice Holmes in *Kepner v. United States*, 195 U.S. 100, 134-35 (1904) (Holmes, J., dissenting).

In the years since *Kepner*, this Court has rejected the theory of "continuing jeopardy" again and again. *See Green v. United States*, 355 U.S. 184, 192-93 (1957); *United States v. Wilson*, 420 U.S. at 352; *Breed v. Jones*, 421 U.S. at 534. As the Seventh Circuit wrote in *Sumpter v. DeGroote*, 552 F.2d 1206, 1210 n.14 (7th Cir. 1977), continuing jeopardy "is fundamentally at odds with normative notions of the 'finality' of appealable judgments and with the current law regarding the attachment and detachment of jeopardy." Thus, the theory of continuing jeopardy cannot be the basis for rejecting Massie's double jeopardy claim here.[5]

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[5] The notion that Massie's double jeopardy claim fails because, in view of the automatic appeal provisions of California law, he had no expectation of finality in his conviction and sentence is merely another way of phrasing the discredited continuing jeopardy theory. If a capital defendant can be retried after a coerced appeal because he had no legitimate expectation of finality in his conviction and sentence, any state could entirely eliminate the double jeopardy clause's bar against retrial after conviction by simply providing for mandatory appeal of ***all*** criminal convictions.

## CONCLUSION

Petitioner Robert Lee Massie was placed in jeopardy for the second time on the same charges when he was retried in 1989 pursuant to the results of a state-mandated appeal which Massie did not initiate, vigorously opposed, and tried to terminate in both state and federal courts. The decision of the California Supreme Court that Massie was never in jeopardy pursuant to his 1979 conviction, despite the unconditional acceptance of his guilty plea by a trial court with uncontested jurisdiction which then sentenced him to death, is contrary to numerous decisions of this Court, the Circuits and the state courts of last resort stretching back a century, and is inconsistent with the long-held view that the granting of motions for new trial on the motion of the trial court or State always raises serious double jeopardy concerns. This petition for a writ of certiorari should be granted in order that this Court may resolve the conflict and reverse the California Supreme Court's judgment.

Respectfully submitted,

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## IN THE SUPREME COURT OF CALIFORNIA

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ROBERT LEE MASSIE,<br>Defendant and Appellant. | S010775<br>Super. Ct. No. 98806<br>San Francisco County<br>(Filed Nov. 30, 1998) |

In 1979, defendant Robert Lee Massie pleaded guilty, against the advice of counsel, to the murder (Pen. Code, § 187)[1] and robbery (§ 211) of Boris Naumoff, and he admitted special circumstance allegations of prior murder (§ 190.2, subd. (a)(2)) and robbery murder (§ 190.2, former subd. (a)(17)(i), now subd. (a)(17)(A)). He also pleaded guilty to the robbery (§ 211) of Yasphine Khashan and George Shatara, assault with a deadly weapon (§ 245) on Charles Harris, and four counts of possession of a concealable firearm by a convicted felon (§ 12021). After a penalty trial at which defendant waived his right to a jury and represented himself, the trial court set the penalty at death.

In 1985, this court reversed defendant's death sentence, the convictions for the robbery and murder of Naumoff, and the two special circumstances, holding that defendant's guilty pleas to the murder and robbery charges were invalid because they were made against the advice of counsel, in violation of section 1018. (*People v.*

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

*Massie* (1985) 40 Cal.3d 620 (*Massie I*).) Section 1018 expressly prohibits a trial court from accepting a "plea of guilty of a felony for which the maximum sentence is death, or life imprisonment without the possibility of parole," when the plea is "without the consent of the defendant's counsel." At a retrial in which defendant was represented by counsel, a jury convicted defendant of the crimes against victim Naumoff and found true the two special circumstance allegations, and at the penalty phase the jury returned a verdict of death. Defendant's appeal to this court is automatic. (§ 1239, subd. (b).)

We affirm the judgment in its entirety.

## I. FACTS

### A. Guilt Phase – Prosecution's Case

On the morning of January 3, 1979, defendant entered the Twin Peaks Grocery in San Francisco, looked around, and left without buying anything. A short time later, he returned to the store and again departed without making a purchase. When he did this a third time, store proprietor Grant Ridgeway followed defendant out of the store.[2] Defendant walked one block to a Chevrolet Vega automobile that was parked with the engine running, got in, and drove away. Ridgeway observed the car's license plate and, having nothing to write with, asked a woman in a nearby house to write it down for him. She wrote down "119 GL," omitting one of the letters that Ridgeway had asked her to write down. Ridgeway later gave the

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[2] At the time of trial, Ridgeway was deceased. His previously given testimony was read to the jury.

piece of paper with the partial license number to the police.

Around 1:45 that afternoon, Kenneth Ross was at the Miraloma Liquor Store, not far from the Twin Peaks Grocery, when defendant entered. Boris Naumoff, who had owned the store for about 30 years, asked defendant, "Can I help you?" Defendant replied, "I'm just looking." He left five minutes later. Ten minutes thereafter, Ross also left the store. He saw defendant standing outside, making nervous, jerky movements and looking up and down the street.

At 3:45 p.m., Sandy Bateman-Collins walked into the Miraloma Liquor Store. Store owner Naumoff was standing behind the counter. He was handing money to a man, but was dropping some of the money on the floor. As the man began to leave, Naumoff followed after him, mumbling, "A guy can't make a living any more." Bateman-Collins then heard three quick shots, followed a few seconds later by a fourth shot. She ducked behind a counter.

Just before the shooting, Charles Harris, who was scheduled to work at the Miraloma Liquor Store that evening, had entered the store and saw store owner Naumoff talking to a man who Harris assumed was a customer. Sensing nothing amiss, Harris walked toward the back room. Hearing a scuffle, he turned and saw Naumoff and the man face-to-face, with Naumoff holding the man in a bear hug. As Harris started to walk towards them, he heard three quick shots, followed by a fourth. He felt a pain in his leg, saw that the man was holding a gun, and ran to the back room.

Outside the Miraloma Liquor Store, 13-year-old Duffy Aceret saw a man run from the liquor store with a gun in his hand. At a lineup several days later, Aceret identified defendant as the man he had seen.

San Francisco police officers, called to the scene, found Naumoff's body on the floor of the Miraloma Liquor Store. He had been shot once in the right chest and twice in the heart. Dr. Boyd Stephens, Chief Medical Examiner for the City of San Francisco, described the two shots to the heart as "near contact wounds," meaning that they had been fired inches from their target.

That evening, Laura Garnett-Young saw a car stop outside her San Francisco home. A man got out of the car and looked around; he doffed his shirt and jacket, put them in her garbage can, and drove away. Garnett-Young wrote down the license number of the car (119 TGL) and gave it to the police. The police retrieved a bloodstained shirt and jacket from Garnett-Young's garbage can. The blood type matched that of victim Naumoff.

The next evening, around 10:00, San Francisco Police Officer Michael Pearson was on patrol with Officer Jeffrey Morlock when he saw a Chevrolet Vega automobile with a license number (119 TJL) that nearly matched the ones given to the police by store owner Grant Ridgeway and by Laura Garnet-Young. The car's headlights were off. Officers Pearson and Morlock followed the car for about five minutes while awaiting the arrival of backup officers; the car took an erratic route, often changing direction. Pearson and Morlock stopped the car and arrested defendant, the sole occupant. They found a loaded .357-caliber revolver in his waistband and

a cocked and loaded .380-caliber automatic pistol in his coat pocket. According to ballistics expert Richard Grzybowski, the four bullets and the four spent casings that the police had found at the Miraloma Liquor Store were fired from the pistol found in defendant's pocket.

Officers Pearson and Morlock took defendant to the San Francisco Hall of Justice, where he was interviewed, shortly before midnight, by San Francisco Police Inspectors Frank Falzon and Herman Clark. Inspector Falzon advised defendant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and asked if he wanted to make a statement. Defendant replied that he wanted some time to think it over. Half an hour later, he agreed to speak to the officers. Defendant said that he went to the liquor store, pulled a gun, and told the man behind the counter, "It's a holdup." The man gave him $20 or $30 but attacked him as he was trying to leave, so defendant shot him. Defendant claimed that he had been drunk and under the influence of cocaine at the time.

**B. Guilt Phase – Defense Case**

Defendant testified in his own defense. He admitted killing store owner Naumoff but denied that the killing occurred during a robbery. After buying liquor and cigarettes from Naumoff, defendant discovered that Naumoff had shortchanged him by $30. He went back into the store and confronted Naumoff, who muttered under his breath but gave him the correct change. As defendant started to leave the store, someone grabbed him in a bear hug and " slammed" him in the face. Defendant thought his attacker was a member of the Aryan Brotherhood, a

prison gang. While struggling to escape, defendant pulled a pistol out of his jacket and fired without aiming. He acknowledged telling Inspectors Falzon and Clark that he had shot Naumoff during a robbery, but said he had done so only because he thought that if he told them what they wanted to hear, they would protect him from an attack by the Aryan Brotherhood by placing him in a separate cell.

To explain his fear of the Aryan Brotherhood, defendant offered evidence that while in prison he had been stabbed in the back in a gang-related assault possibly attributable to the Aryan Brotherhood, a dangerous gang that had killed many people. A former member of the Aryan Brotherhood testified that for years the gang had been trying to kill defendant, and prison officials testified that to protect defendant from gang attacks California prison authorities had transferred him at various times to Kansas, Nevada, and Washington to serve his sentence for a crime he had committed in California. Doctor Wesley Clark, a psychiatrist, explained that persons who have suffered violent trauma, such as the stabbing defendant had experienced in prison, often react with "hypervigilance" to situations that appear to be threatening; that is, they "become very agitated and violent."

To rebut defendant's testimony that the killing of store owner Naumoff did not occur during a robbery, the prosecution offered evidence that defendant had robbed two small markets in San Francisco not far from the store where Naumoff was killed. One of the robberies occurred the day before the Naumoff's murder and the other took place the morning of his death.

### C. Prior Murder Special Circumstance

The parties stipulated that defendant had suffered a prior conviction for murder in 1965.

### D. Penalty Phase – Prosecution's Case

Between January 7 and January 15, 1965, defendant committed a series of robberies and assaults in Los Angeles County. On the evening of January 7, Franklin Boller was getting out of his car in front of his home in West Covina when defendant approached him, hit him in the mouth with a rifle, and demanded money. Boller gave defendant his wallet and coin purse. Defendant then fired a shot at Boller, grazing the side of his head.

Later that evening, Morris and Mildred Weiss were returning to their San Gabriel home. As Mildred got out of the car, defendant approached and fatally shot her. He then jumped into a waiting car and sped away.

Just before 12 o'clock that same night, defendant entered a bar in Baldwin Park, brandished a rifle, and said, "This is a stickup." He took money from the cash register and the wallets of the bartender and patron Archie Bolivar. The bartender threw a beer bottle at defendant, who fled.

On January 15, 1965, defendant encountered Frank Patti at MacArthur Park in Los Angeles. The two of them agreed to go to Patti's hotel room. There, defendant pulled a revolver, demanded money, and told Patti to take his clothes off. Patti attacked defendant, who fired three shots and fled. Two shots hit Patti in the stomach and the third grazed his neck.

Defendant was arrested on January 20, 1965, for the assault on Patti. He gave two tape-recorded statements in which he admitted committing all of the crimes described above and said he was trying to rob Mildred Weiss when he shot and killed her. He was convicted of four counts of robbery, one count of attempted murder, and one count of murder.

**E. Penalty Phase – Defense Case**

Defendant was born in Virginia to a 15-year-old woman and a man who had married her only to avoid a charge of statutory rape. Between his birth and his 11th birthday, defendant had been placed with 5 different foster parents, at times living with his mother or his grandparents. At one foster home, he was disciplined by getting whipped with switches and having his head held under water. Between the ages of four and six, he was living with his mother, who took him barhopping; his stepfather physically abused him.

At the age of 11, defendant was sent to the Beaumont School for truant and runaway boys in Virginia. Boys who misbehaved were whipped up to 40 times with a thick leather belt.

At the age of 17, defendant stole a car and was sentenced to adult prison, where he was gang-raped by 4 older inmates. Because of this experience, defendant feigned insanity, resulting in commitment to a prison psychiatric facility.

Various witnesses described defendant as having become a religious man who felt remorse for killing store

owner Naumoff. While serving his sentence for the 1965 murder of Mildred Weiss, defendant had been an exemplary prisoner who cooperated with staff, performed valuable clerical services, got along well with other prisoners, and acted as a peacemaker to ease tensions among inmates.

## II. DISCUSSION

### A. Double Jeopardy

Defendant contends that because the appeal from his initial conviction and death sentence in this case was taken automatically and over his opposition, and because he filed a petition for rehearing challenging this court's reversal of his conviction and death sentence, double jeopardy principles barred the prosecution from retrying him. A summary of the pertinent facts follows.

As explained at the outset, defendant initially entered (against his attorney's advice) a plea of guilty to the charge of capital murder and was thereafter sentenced to death. His death judgment was automatically appealed to this court, under subdivision (b) of section 1239 (hereafter section 1239(b)).

Defendant asked this court not to appoint counsel to pursue the automatic appeal and to dismiss it, arguing that under the state and federal Constitutions he had a right to waive the automatic appeal. When we refused to do so, defendant petitioned for a writ of habeas corpus in the federal district court; he sought self-representation and dismissal of the appeal. The court denied the writ, and defendant appealed. The United States Court of

Appeals for the Ninth Circuit upheld the district court's ruling, holding that section 1239(b), which bars a defendant who is sentenced to death from waiving an appeal, does not violate the federal Constitution. (*Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, cert. den. (1981) 449 U.S. 1103.)

We then reversed defendant's conviction and death sentence, holding that defendant's plea of guilty was invalid because California law (§ 1018) does not permit a defendant in a capital case to enter a plea of guilty against the advice of counsel. (*Massie I, supra,* 40 Cal.3d 620.) Defendant sought a rehearing, asking us to reinstate his conviction and death sentence, and asserting that to retry him would violate the constitutional prohibition against double jeopardy. We denied the petition for rehearing.

When the prosecution attempted to retry defendant for the murder of store owner Naumoff, defendant entered a plea of "once in jeopardy" (§ 1016, subd. 5), contending that he had been placed in jeopardy when he was first convicted of capital murder, that this court had reversed his conviction over his objection, and that therefore the state and federal prohibitions against double jeopardy barred the state from again prosecuting him for the same offense. When the trial court rejected defendant's double jeopardy claim, he raised the issue in a petition for writ of habeas corpus in the federal district court. The court denied the writ; the denial was affirmed on appeal. (*Massie v. Hennessey* (9th Cir. 1989) 875 F.2d 1386, cert. den. (1990) 494 U.S. 1039.)

*1. Federal constitutional claim*

The Fifth Amendment to the federal Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . . " The double jeopardy clause protects criminal defendants in three ways: " 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' " (*Schiro v. Farley* (1994) 510 U.S. 222, 229, quoting *North Carolina v. Pearce* (1969) 395 U.S. 711, 717.) The second of these protections – the bar against a second prosecution for the same offense after conviction – is at issue here.

As defendant points out, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put into jeopardy* for such punishment. [Citation.] That is, the Double Jeopardy Clause 'prohibits merely punishing twice or *attempting a second time to punish criminally,* for the same offense.' [Citation]" (*Witte v. United States* (1995) 515 U.S. 389, 396, original italics.) Defendant contends that by seeking to retry him for murder after reversal of his conviction, which was based on a plea of guilty, the prosecution was for the second time trying to punish him criminally for the same offense. But, as the Attorney General points out, here defendant was not placed in jeopardy when he initially entered his plea of guilty to the charge of murder with special circumstances, because the plea was invalid. As we mentioned earlier,

California law does not allow a capital defendant to plead guilty against the advice of counsel, as occurred here. (*Massie I, supra,* 40 Cal.3d at p. 625.)

Ordinarily, jeopardy attaches when a defendant enters a plea of guilty, or when the court imposes sentence following the entry of that plea. (See, e.g., *Dawson v. United States* (7th Cir. 1996) 77 F.3d 180, 182; *United States v. Faber* (9th Cir. 1995) 57 F.3d 873, 875; *United States v. Santiago Soto* (1st Cir. 1987) 825 F.2d 616, 618-619; *United States v. Felton* (3d Cir. 1985) 753 F.2d 276, 278; *United States v. Cambindo Valencia* (2d Cir. 1979) 609 F.2d 603, 637.)[3] Jeopardy does not attach when the plea is invalid, however. "[A]n unlawful guilty plea is null and therefore does not bar a second prosecution for the same offense. Thus, if a court lacks jurisdiction to accept defendant's plea or if the plea violates any statute, then the plea and sentence will not bar reprosecution." (22 C.J.S. (rev. 1989) Criminal Law, § 223, p. 272.) We know of no authority to the contrary. The cases that defendant has cited are not on point, for none involved a void plea of guilty.

This case is analogous to *Cox v. State* (Fla. 1982) 412 So.2d 354. There, the trial court, over the prosecutor's objection, accepted a defendant's plea of guilty to a lesser offense included within the crime charged. On an appeal by the prosecution, the Florida Supreme Court invalidated the guilty plea, holding that under Florida law the

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[3] As defendant observes, the federal courts are not in agreement as to whether jeopardy attaches when the guilty plea is accepted by the court, or when sentence is imposed following the entry of that plea. We express no views on the merits of that debate.

trial court could not accept such a plea without the prosecutor's consent. The court also held that because the guilty plea was invalid, jeopardy had not attached, and the state could again prosecute the defendant without violating the federal Constitution's prohibition against double jeopardy. (*Id.* at pp. 355-356; see also *Bayless v. United States* (8th Cir. 1945) 147 F.2d 169, 170.) Here, too, as explained earlier, defendant's guilty plea was invalid. Thus, as in *Cox*, jeopardy did not attach upon entry of the invalid guilty plea. Therefore, the prosecution could try defendant for the murder of store owner Naumoff.

Defendant insists that the trial court did have the power to accept his plea of guilty to the charge of capital murder. He asserts that section 1018, which bars a trial court from accepting a guilty plea in a capital case over the advice of counsel, "is unconstitutional as a violation of the Sixth Amendment right to control one's own defense, the Fourteenth Amendment's Equal Protection clause, and their respective California law counterparts." We rejected this contention in *People v. Chadd* (1981) 28 Cal.3d 739, 747-754, and we see no reason to reconsider the issue. Defendant also maintains that in his earlier appeal, *Massie I, supra,* 40 Cal. 3d 620, we should have found section 1018 inapplicable because his trial counsel consented in court to the plea of guilty, even though the plea was against counsel's advice. We rejected that contention in *Massie I, supra,* and we do not reconsider it here.

*2. State constitutional and statutory claims*

Defendant further contends that by retrying him for Naumoff's murder, the state also violated the prohibitions against double jeopardy contained in the state Constitution and statutory provisions. As he points out, article I, section 15 of the state Constitution provides, "Persons may not twice be put in jeopardy for the same offense." The California Penal Code contains similar provisions. (See § 687 ["No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."]; § 1023 ["When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading. . . . "].)

As discussed earlier, when, as in this case, a defendant has entered an invalid guilty plea, the federal Constitution does not bar a second prosecution. We see no reason why a similar rule should not apply to the double jeopardy prohibitions contained in the state's Penal Code and Constitution. As a leading treatise on California law has pointed out: "Where a guilty plea is properly vacated, *whether on the defendant's motion or otherwise,* the double jeopardy prohibition does not prevent a trial on the offense charged." (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 302, p. 348, italics added; see also *People v. Clark* (1968) 264 Cal.App.2d 44, 47 ["In our view double jeopardy no more follows the vacation of an erroneously accepted plea than it does an instance of

mistaken identity, incompetency, corruption, or mistrial."].)

3. *Jurisdiction to hear appeal in* Massie I, supra, *40 Cal.3d 620*

Defendant contends that following our reversal of his convictions and death sentence in *Massie I, supra,* 40 Cal.3d 620, the prosecution was precluded from further prosecuting him for the same capital murder. He asserts that we were "without authority" to hear the appeal of his 1979 guilty plea and death sentence, and that therefore the subsequent trial violated the bar against double jeopardy. He presents five bases for this contention: (1) This court should have honored his request to waive the appeal; (2) the appeal was barred because his counsel failed to obtain a certificate of probable cause; (3) by entertaining the appeal, this court violated defendant's constitutional rights to control his defense, to due process, and to equal protection of the law; (4) the appeal was barred by the rule against advisory opinions; and (5) by entertaining the appeal, this court created an irreconcilable ethical conflict for the attorney appointed to represent defendant on appeal.

It is difficult to see how this argument could benefit defendant. If we were to decide here that in *Massie I, supra,* 40 Cal.3d 620, we should have honored defendant's request to dismiss the automatic appeal, the guilty plea that formed the basis for the robbery and capital murder convictions in that case would still be invalid because, as explained earlier, the plea was impermissible under California law and therefore the trial court lacked the power

to accept it. Moreover, even if that guilty plea were to be reinstated, so would defendant's sentence of death. In any event, we conclude that this court had the power to set aside the robbery and murder convictions arising from defendant's 1979 plea of guilty.

*a. Defendant's request to waive his appeal*

Defendant faults this court for not allowing him to waive the automatic appeal in *Massie I, supra,* 40 Cal.3d 620, following his guilty plea to capital murder. He acknowledges that we rejected an identical contention in *People v. Stanworth* (1969) 71 Cal.2d 820. He argues, however, that *Stanworth* was wrong and should be overruled. We disagree.

Section 1239(b) provides that an appeal of a sentence of death "is automatically taken" to this court. As we explained in *Stanworth:* This statute "imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.' . . . [¶] . . . We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him." (*People v. Stanworth, supra,* 71 Cal.2d at p. 833.)

In taking a contrary view, defendant argues that the Legislature never intended to prevent capital defendants from waiving the right to an appeal. In support, he cites to a legislative committee report issued in 1935. This report was not discussed in *People v. Stanworth, supra,* 71

Cal.2d 820, and defendant asks us to take judicial notice of it. We do so.[4]

In 1935, condemned inmate Rush Griffin was executed before his appeal had been heard. Griffin's attorney had filed a notice of appeal in the superior court, but the clerk's transcript of the trial proceedings was not forwarded to this court until three days *after* Griffin's execution. At that time, it was customary for the clerk of this court to notify the warden of San Quentin prison by letter that an appeal was pending, but because the superior court had not informed this court that the defendant had appealed, no such letter was written. The superior court

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[4] At defendant's request, we take judicial notice of legislative history relating to the 1935 amendment to section 1239(b); of legislative history relating to the passage in 1965 of section 1237.5, requiring defendants who appeal following a plea of guilt to obtain a certificate of probable cause (see pt. II.A.2.b., post); and of the unpublished federal district court decision in *Massie v. Sumner* (N.D.Cal. Oct. 3. 1979) Dock. No. C-79-1660) rejecting defendant's attempt to secure dismissal of the automatic appeal of his death sentence arising from his guilty plea. The materials are appropriate subjects of judicial notice. (See generally, *Planning & Conservation League v. Department of Water Resources* (1998) 17 Cal.4th 264, 271, fn. 4; *People v. Eubanks* (1996) 14 Cal.4th 580, 591, fn. 3). We deny, however, defendant's request that we take judicial notice of a series of newspaper articles describing the 1935 execution of condemned inmate Rush Griffin while his appeal was pending and the ensuing proposals to require automatic appeals of death sentences. Nor do we take judicial notice of an excerpt from a document entitled Review of Selected 1965 Code Legislation, a publication of California Continuing Education of the Bar, discussing an amendment to section 1237.5. (See generally, *People v. Ramos* (1997) 15 Cal.4th 1133, 1167; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065.)

sent the warden a letter mentioning the appeal, but the warden overlooked the letter and carried out Griffin's execution. (Special Com. to Investigate the Execution of Rush Griffin, Rep. (May 28, 1935) Sen. J. (1935 Reg. Sess.) p. 2427 (hereafter Special Committee Report).)

The special legislative committee that looked into the matter concluded that "the existing procedures of law are woefully inadequate with reference to the procedure for appeal of cases involving the death penalty." (Special Com. Rep., supra, p. 2428.) The committee recommended that legislation be enacted providing, among other things, for "an automatic appeal . . . in all cases in which the penalty of death is imposed" and that "the date of execution be set by the trial judge upon the receipt by him of the Appellate Court's order affirming the death penalty, and not as now provided when sentence is pronounced by the trial judge." (*Ibid.*) Legislation to so amend section 1239 was introduced in the state Senate on May 28, 1935, the same day on which the Special Committee Report was recorded in the Senate Journal. Both the Senate and the Assembly swiftly approved the proposed amendment; seven weeks later, the Governor signed it into law.

The holding in *People v. Stanworth, supra,* 71 Cal.2d 820, that a capital defendant may not waive the automatic appeal provided by section 1239(b) is consistent with the legislative purpose reflected in the Special Committee Report just discussed. To prevent an execution *before* determination of an appeal, the committee recommended that legislation be enacted requiring that "*all cases* in which the death penalty is imposed" be automatically appealed to this court. (Special Com. Rep., *supra,* p. 2428, italics added.) Section 1239(b), which expressly provides

for an automatic appeal in every capital case, implements this recommendation. If, as defendant contends, the Legislature's intent was to permit a condemned inmate to waive an appeal to a death judgment, it could easily have said so. It did not.

We decided *People v. Stanworth, supra,* 71 Cal.2d 820, almost 30 years ago. Since then, the Legislature has reenacted section 1239 (Stats. 1982, ch. 917, § 4, p. 3355) and has amended it on two other occasions (Stats. 1975, ch. 1125, § 3, p. 2744; Stats. 1988, ch. 551, § 1, p. 2013), but it has never altered section 1239's requirement that "[w]hen . . . a judgment of death is rendered, an appeal is automatically taken by the defendant." The quoted phrase forms the basis for Stanworth's holding that an appeal of a judgment of death may not be waived. " 'When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.' " (*People v. Ledesma* (1997) 16 Cal.4th 90, 100-101, see also *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235 ["In the absence of legislative history suggesting otherwise, there is a very strong presumption that the Legislature intends that the same construction be given statutory language which has been readopted without change."].)

*b. Requirement of a certificate of probable cause following a guilty plea*

Defendant contends that this court lacked jurisdiction to hear his 1979 automatic appeal in *Massie I, supra,* 40 Cal.3d 620, because it arose from a plea of guilty and the trial court did not issue a certificate of probable cause as, defendant contends, is required under section 1237.5.

Section 1237.5 requires a defendant to obtain from the trial court a certificate of probable cause when appealing from a conviction resulting from a plea of guilty. In 1979, when defendant entered his plea of guilty in this case, section 1237.5 provided in relevant part: "No appeal shall be taken by [a] defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where: [¶] (a) The defendant has filed with the trial court a *written* statement, executed under oath or penalty of perjury[,] showing reasonable . . . grounds going to the legality of the proceedings; and [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk." (Italics added.) Defendant points out that he did not file with the trial court the requisite written statement and the trial court did not issue a certificate of probable cause. Accordingly, he argues, this court lacked jurisdiction to entertain his appeal in *Massie I, supra,* 40 Cal.3d 620.

Defendant acknowledges that to require a defendant sentenced to death to obtain a certificate of probable cause would be inconsistent with section 1239(b), which, as previously explained, provides that a judgment of death results in an automatic appeal "without *any action* by [the defendant] or his . . . counsel." (Italics added.)

Defendant argues, however, that because section 1237.5's "certificate of probable cause" requirement was enacted more recently than section 1239(b)'s automatic appeal provision, section 1237.5 controls. He invokes the principle of statutory construction that "in the event of a conflict between two statutes, effect will be given to the more recently enacted law." (*Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, 160.) Principles of statutory construction guide us in achieving our ultimate task, which is to ascertain the Legislature's intent. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 937.) As we explain below, after examining the purpose of section 1237.5 we conclude that the Legislature did not intend that provision to apply to appeals from judgments of death based on a plea of guilty.

"The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy 'by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court.' [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 75-76.) This goal is inapplicable to an appeal from a sentence of death because, as we have explained, the Legislature has imposed on this court a duty to examine the record in *all* death sentence cases to determine whether the proceedings leading to the conviction and sentence were conducted fairly. (*People v. Stanworth, supra*, 71 Cal.2d at p. 833.) We therefore reject defendant's contention that in

enacting section 1237.5, which generally requires a certificate of probable cause in cases involving a plea of guilty or nolo contendere, the Legislature intended that requirement also to apply to automatic appeals in capital cases.

*c. Alleged violation of defendant's state and federal constitutional rights*

Defendant contends that if, as we held in *People v. Stanworth, supra,* 71 Cal.2d at pp. 832-834, section 1239(b) bars this court from dismissing, even at a defendant's request, an automatic appeal from a judgment of death, it is unconstitutional because it violates a defendant's "right to control his defense." He asserts that this right arises from the provisions of the state and federal Constitutions entitling a criminal defendant to the assistance of counsel. (U.S. Const., Amend. VI; Cal. Const., art. I, § 15.)

Defendant relies primarily on *Faretta v. California* (1975) 422 U.S. 806, which holds that a criminal defendant has the right of self-representation at trial. But, as we noted in *Massie I,* " '*Faretta* does not purport . . . ' . . . to abrogate the rule . . . that a capital defendant has no right to waive his automatic appeal." (*Massie I, supra,* 40 Cal.3d at p. 624.)

Defendant points to isolated comments in federal cases that were decided after our decision in *Massie I* and state that a defendant has the right to decide whether to appeal. (See *Jones v. Barnes* (1983) 463 U.S. 745, 751 ["[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his own behalf, or *take an appeal.* . . . " (Italics added.) ]; *Marrow v.*

*United States* (9th Cir. 1985) 772 F.2d 525, 530 ["The decision whether to appeal 'must be the defendant's own choice,' . . . even after a guilty plea. . . . "].) We do not view these passing remarks, taken out of the context in which they arose in noncapital cases, as establishing a rule that a capital defendant who has been sentenced to death has a constitutional right to waive an automatic appeal.

Defendant relies on a series of recent cases in which we have held that at trial a capital defendant may elect self-representation and present no mitigating evidence on his own behalf, notwithstanding California's interest in assuring a "reliable" penalty determination in capital cases. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1363-1373; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1062-1064; *People v. Diaz* (1992) 3 Cal.4th 495, 566; *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Edwards* (1991) 54 Cal.3d 787, 809-811; *People v. Lang* (1989) 49 Cal.3d 991, 1029-1030.) These cases, he argues, demonstrate that the state's interest in the reliability of a capital trial does not "outweigh" a defendant's right to control the defense. No weighing, however, is required. *Faretta v. California, supra,* 422 U.S. 806, does not grant defendants the right to "control" their *appeals,* either by electing self-representation (*People v. Scott* (1998) 64 Cal.App.4th 550 [no right of self-representation on appeal]; *In re Walker* (1976) 56 Cal.App.3d 225, 228-229 [same]), by electing which issues to raise (see *People v. Clark* (1992) 3 Cal.4th 41, 173 [court will not accept in propria persona filings in automatic appeal]), or (as urged by defendant) by waiving an automatic appeal.

Defendant further contends that section 1239(b), which prohibits this court from granting requests by defendants sentenced to death to dismiss their automatic appeals, violates his right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. We disagree. As we have explained, "the first prerequisite to such a claim is a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' " (*People v. Andrews* (1989) 49 Cal.3d 200, 223, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted.) Section 1239(b) applies to individuals who, like defendant, have been sentenced to death. Defendant fails to identify any other similarly situated group that is affected differently by section 1239(b).

*d. Rule against advisory opinions*

Defendant argues that because the automatic appeal in *Massie I, supra,* 40 Cal.3d 620, was taken against his wish, it did not present a case or controversy ripe for decision and therefore, lacking the power to render advisory opinions, we could not consider the appeal. He relies on *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 284, in which we reiterated the "well-established rule" that we should "avoid advisory opinions." Our decision in *Massie I, supra,* 40 Cal.3d 620, however, was not an advisory opinion, because its effects were real, not theoretical: it reversed defendant's robbery and murder convictions as well as his sentence of death.

Moreover, our *policy* against advisory opinions does not deprive us of the *power* to hear an appeal notwithstanding the appealing party's request that it be dismissed. There is a " 'well-established line of judicial authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance.' " (*State of Cal.* ex rel. *State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 61.) Defendant's convictions and death sentence were properly before us in *Massie I, supra,* 40 Cal.3d 620, because they came within the automatic appeal provision of section 1239(b). We therefore had the power to hear the appeal notwithstanding defendant's request to dismiss it.

*e. Alleged conflict of interest*

Defendant asserts that, by prohibiting a condemned inmate from waiving an automatic appeal, section 1239(b) creates "an irreconcilable ethical conflict for defendant's appointed counsel." He points to the ethical duty of an attorney to follow the client's wishes regarding the objectives of the representation. (See ABA Model Rules Prof. Conduct, rule 1.2(a) ["A lawyer shall abide by a client's decisions concerning the objectives of the representation."].) When a condemned inmate wishes to give up the right to an automatic appeal, defendant argues, section 1239(b) places the defense attorney in an impossible situation. As appellate counsel, the attorney is obligated to seek out grounds for reversal. (See generally, *In re Smith* (1970) 3 Cal.3d 192, 197; *People v. Feggans* (1967) 67 Cal.2d

444, 447.) Yet the attorney is also under an ethical duty to abide by the client's wish to seek dismissal of the appeal, thus resulting in the affirmance of the conviction and the sentence of death. As defendant puts it: "To require that the attorney serve two masters, both the client and the state's abstract interest in avoiding the arbitrary and capricious imposition of the death penalty, is to deprive the capital defendant of his Sixth Amendment right to counsel unfettered by conflicts of interest."

We find no conflict of interest. It is true that an attorney "must always respect and defer to those decisions properly reserved to his client." (*Davis v. State Bar* (1983) 33 Cal.3d 231, 238.) But a defendant sentenced to death is not free to decide whether or not to appeal, because the Legislature has decreed that there be an *automatic* appeal in every capital case (§ 1239(b)) that cannot be waived. Contrary to defendant's assertion, defense counsel has no ethical obligation to comply with a capital defendant's request to abandon the appeal, for to do so is, as just explained, not permitted.

4. *Double jeopardy effect of defendant's robbery conviction in* Massie I, supra, *40 Cal.3d 620*

At the time of his initial trial in 1979, defendant pleaded guilty to the robbery and murder of store owner Naumoff. On defendant's automatic appeal, this court held that *both* guilty pleas were invalid and reversed *both* convictions. We reasoned that defendant was not permitted to plead guilty to the robbery charge against the advice of his attorney because, under the felony-murder rule, the elements of the *robbery* charge were essential

elements of the *murder* for which defendant was sentenced to death. We pointed out that unless we reversed the robbery conviction, that conviction " 'would be conclusive on retrial of the murder count and the prosecution would need only prove the fact of the killing in its perpetration in order to obtain a new conviction of first degree murder.' " (*Massie I, supra,* 40 Cal.3d at p. 625, quoting *People v. Chadd, supra,* 28 Cal.3d at p. 755; *People v. Ballentine* (1952) 39 Cal.2d 193, 197.)

Defendant contends that his trial for *murder,* following his plea of guilty to robbery (*Massie I, supra,* 40 Cal.3d 620), impermissibly placed him in double jeopardy. He points out that the murder and the robbery of Naumoff were the "same offense" for double jeopardy purposes, because, to establish defendant's guilt of murder under the felony-murder rule, the prosecution had to prove defendant's commission of the robbery. (See *United States v. Dixon* (1993) 509 U.S. 688, 698 ["[F]or double jeopardy purposes, 'the crime generally described as felony murder' is not 'a separate offense distinct from its various elements.' "]; *Harris v. Oklahoma* (1977) 433 U.S. 682 [double jeopardy clause barred robbery prosecution of a defendant previously tried for felony murder based on the same robbery].) But, as explained in parts II.A.1 and II.A.2, *ante,* jeopardy does not attach to an invalid plea of guilty. Defendant's guilty plea to robbery, which, under the felony-murder rule, relieved the prosecution from having to prove some of the elements of the capital murder with which defendant was also charged, was invalid because the plea was entered against defense counsel's advice. As we mentioned earlier, California law

prohibits such a plea in a capital case. (§ 1018.) Accordingly, there is no merit to defendant's claim that his trial violated the constitutional prohibition against double jeopardy.

Defendant also argues that section 1239(b)'s automatic appeal provision pertains only to his murder conviction, not to convictions for other crimes charged in the same accusatory pleading. He asserts that in *Massie I, supra,* 40 Cal.3d 620, we lacked jurisdiction to reverse his robbery conviction and that therefore the trial of the murder, the "same offense" as the robbery for double jeopardy purposes (*United States v. Dixon, supra,* 509 U.S. at p. 698), violated the prohibition against double jeopardy.

Assuming for the sake of argument that the doctrine of law of the case does not dispose of this contention,[5] we

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[5] " 'The doctrine of the law of the case is this: That where, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.' " (*People v. Shuey* (1975) 13 Cal.3d 835, 841, quoting *Tally v. Ganahl* (1907) 151 Cal. 418, 421, see also *People v. Ramos, supra,* 15 Cal.4th at p. 1161.) Here, defendant challenges a principle of law necessary to the decision of this court in his previous appeal, a situation ordinarily covered by the doctrine of law of the case. Our cases do not state, however, whether the doctrine may be applied against a defendant who, as in this case, was an unwilling participant in the previous appeal. We

find it to be without merit. At the time of defendant's 1979 convictions for robbery and capital murder, section 1239(b) provided: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." Nothing in that language limits the scope of a defendant's automatic appeal to the crime or crimes for which the defendant was sentenced to death. We therefore construe that provision as requiring an automatic appeal to this court of the *entire* judgment, thus including convictions for noncapital as well as capital crimes.

**B. Cruel and Unusual Punishment**

Defendant contends that to execute him after more than 16 years of confinement on death row would be cruel and unusual punishment, in violation of the Eighth Amendment to the federal Constitution. He notes that two justices of the United States Supreme Court have taken the view that "the importance and novelty of the question . . . are sufficient to warrant review" by that court. (*Lackey v. Texas* (1995) 514 U.S. 1045 (mem. opn. by Stevens, J., on denial of cert.; accord, Breyer, J.).)

We rejected a similar claim in *People v. Hill* (1992) 3 Cal.4th 959. (See also *People v. Frye* (1998) 18 Cal.4th 894, 1030-1031.) Defendant, however, insists that in *Hill* we considered only whether the delay itself amounted to cruel and unusual punishment, whereas his argument raises a slightly different point: that the cruel and

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therefore assume for the sake of argument that the doctrine is inapplicable and address defendant's claim on its merits.

unusual punishment arises from the execution that occurs after the delay. Defendant misconstrues *Hill*, which held that the delay inherent in the automatic appeal process "is not a basis for finding that either *the death penalty itself* or the process leading to it is cruel and unusual punishment." (*People v. Hill, supra*, 3 Cal.4th at p. 1016, italics added.) Defendant also maintains that his case is distinguishable from *Hill* because he, unlike the defendant in *Hill*, made every possible effort to block consideration of his initial appeal and thus to speed up the appellate process. Our decision in *Hill*, however, was not based on the defendant's failure to ask for dismissal of his appeal. Rather, we concluded that substantial delay in the execution of a sentence of death is inherent in this state's automatic appeal process, but that this delay is a "constitutional safeguard," not a "constitutional defect." (*Id.* at p. 1014.) An execution following such delay is not cruel and unusual punishment. Our decision in *Hill* compels us to reject defendant's claim of cruel and unusual punishment in this case.

### C. Admission of Defendant's Confession

Before trial, defendant moved to suppress his tape-recorded confession to the murder of store owner Naumoff. The trial court denied the motion. At the suppression hearing the following testimony was presented.

Defendant was arrested around 10:00 p.m. on January 4, 1979, the day after Naumoff's murder. The arresting officers took him to the police station in the San Francisco Hall of Justice. In an interview room, Homicide

Inspector Frank Falzon, in the presence of Inspector Herman Clark, advised defendant of his rights under *Miranda v. Arizona, supra,* 384 U.S. 436, and asked if defendant wished to make a statement. According to Falzon, defendant replied that his "head wasn't clear"; he wanted food and some time to think about whether he wanted to make a statement. The officers gave defendant coffee and a sandwich. They told him that if he would not consent to a search of his car and his residence, they would seek a search warrant. Defendant then gave a written consent to the search.

The officers then left defendant alone in the interview room for 20 to 40 minutes. When they returned, defendant said he would talk to them.

Inspector Falzon turned on a tape recorder. He again read defendant his *Miranda* rights and again asked if defendant wanted to make a statement. Defendant responded, "I will talk to you only on one condition." He then explained that people within the prison system were trying to kill him, and that he feared for his safety. He therefore wanted to be housed in a separate jail cell. Inspector Falzon replied, "I believe that can be accommodated for you sir." When defendant insisted on a "guarantee" of a single cell, Falzon said that he and Inspector Clark did not run the jail, but that they would tell the sheriff that defendant's life was in danger, and that they would "do everything within [their] power" to get defendant a separate cell. Defendant then asked, "Will you also not publish what I'm saying to you now?" Falzon replied that defendant's statement would not be made public before defendant's trial, but that the tape recording would probably be played at the trial. Defendant then

agreed to talk to the officers. He admitted shooting store owner Naumoff after robbing him. Defendant concluded his statement by saying that he had agreed freely and voluntarily to talk to the officers.

At the suppression hearing, however, defendant claimed that he had falsely confessed to Inspectors Falzon and Clark because they "intimidated or threatened" him. He said that Inspector Clark told him, before the tape recorder was turned on, that it was in defendant's "best interest" to talk to the police. According to defendant, Clark said that defendant needed to be placed in protective custody for his safety, and that if defendant refused to speak to the officers he "wasn't going to get the protective custody." Testifying in rebuttal, Inspector Clark denied making these statements.

For reasons given below, we reject defendant's contention that his confession was involuntary because it was induced by promises of leniency, and that it therefore should have been suppressed.

The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489.) The same is now true under California law as a result of an amendment to the state Constitution enacted as part of Proposition 8, a 1982 voter initiative. (See Cal. Const., art. I, § 28, subd. (d); *People v. Markham* (1989) 49 Cal.3d 63, 71.) At the time of the murder here, however,

state law required the prosecution to establish the voluntariness of a confession beyond a reasonable doubt. (*People v. Memro* (1995) 11 Cal.4th 786, 826.) That law therefore governs this case.

Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Williams* (1997) 16 Cal.4th 635, 660.) Among the factors to be considered are " 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' " (*People v. Williams, supra,* 16 Cal.4th at p. 660.) On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*People v. Jones, supra,* 17 Cal.4th 279; *People v. Memro, supra,* 11 Cal.4th at p. 826.) In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Memro, supra,* 11 Cal.4th at p. 827.)

After an independent review of the record, we agree with the trial court that, under the totality of circumstances, defendant's confession was voluntary. True, before he confessed, defendant asked Inspector Falzon to promise that he would be placed in a separate cell. But Falzon never made such an express promise; rather, he explained to defendant that he and Inspector Clark did not "run the San Francisco City Jail," but that they would

try to have him placed in a separate cell. More importantly, Inspector Falzon never told defendant that any effort to secure defendant a separate cell would be *contingent* on defendant's decision to give a statement. As to defendant's claim that Inspector Clark threatened that defendant would not be placed in protective custody if he refused to make a statement, the trial court rejected that claim. That finding has ample support in Inspector Clark's testimony denying that he had made such a threat.

**D. Pretrial Publicity**

Defendant asserts that adverse and prejudicial pretrial publicity, created in part by statements that San Francisco Police Inspector Frank Falzon gave to the media, denied him a fair trial.

On September 9, 1988, two months before the start of jury selection in defendant's case, a San Francisco television station broadcast a program entitled Life After Death Row. Appearing on the program was Inspector Falzon. The program's narrator explained that before 1972 defendant was convicted of murder and sentenced to death, that after his death sentence was invalidated by a court decision he was released on parole, and that shortly thereafter he was charged with killing store owner Naumoff. The narrator also mentioned that defendant had pleaded guilty to murdering Naumoff and had again been sentenced to death, but that because of a "legal loophole" the conviction was overturned. Inspector Falzon said during the broadcast that defendant had killed once before, had been paroled, and had killed again. He

added that the prosecution had done nothing wrong in connection with defendant's initial conviction for killing Naumoff, that the taxpayers should not be "stuck" with the cost of a retrial, and that defendant had "learned how to beat the criminal system." Falzon played portions of defendant's tape-recorded confession. Also appearing on the program were defendant and his attorney, each of whom asserted defendant's innocence.

On the morning before the program was broadcast, columnist Herb Caen of the San Francisco Chronicle mentioned the upcoming telecast in his column. Caen wrote that defendant's conviction for killing Naumoff had been "reversed by [former Chief Justice] Rose Bird," and he quoted Inspector Falzon's statement, "This guy used to say he wanted to die. I hope he gets his wish."

In October 1988, a voter information pamphlet was distributed to all the voters in the State of California. On the ballot that November was Proposition 89, an initiative proposing to give the Governor of California the power to overturn decisions of the parole board. The argument in favor of the initiative mentioned that defendant was sentenced to death for murder in 1965, that his death sentence was overturned on appeal, that he was released on parole in 1978, and that he killed a "store clerk" in 1979.

On November 21, 1988, while jury selection was underway, an article entitled, *Jury Selection Begins in Retrial of Death Row Survivor,* appeared in another local newspaper, the San Francisco Examiner. The story mentioned defendant's 1965 conviction for murder, his release on parole, his arrest, conviction, and death sentence for

killing San Francisco store owner Naumoff, and this court's reversal of defendant's conviction for the murder of Naumoff.

On three occasions, defendant asked the trial court to dismiss the charges against him, contending that the pre-trial publicity made it impossible for him to have a fair trial, and that Inspector Falzon's statements to the news media constituted "prosecutorial misconduct" because they increased the likelihood that any jury selected to try his case would be tainted by prejudicial publicity. He also made a motion for a change of venue. The trial court denied the motions. Defendant now argues that even if the court properly denied his motions to dismiss the charges, it should at least have granted his less drastic request for a change of venue. We disagree.

A trial court should grant a criminal defendant's motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (§ 1033, subd. (a).) Among the factors to be considered are " 'the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and of course the nature and extent of the publicity.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 505.) A denial of a motion for change of venue will be upheld on appeal unless the record shows both that it was " 'reasonably likely [that] a fair trial could not be had at the time the motion was made,' " and that it was " 'reasonably likely a fair trial was not in fact had.' " (*People v. Dennis* (1998) 17 Cal.4th 468, 523.)

The first factor – the nature and gravity of the offense – weighed in favor of a change of venue, as defendant was charged with a capital crime only a short time after his release on parole following a long sentence for murder. This factor, however, was not dispositive. (See, e.g., *People v. Dennis, supra,* 17 Cal.4th at p. 523; *People v. Williams, supra,* 16 Cal.4th at p. 655; *People v. Sanders, supra,* 11 Cal.4th at p. 506.) The second factor – the size of the community – weighed heavily against a change of venue, because San Francisco, where store owner Naumoff was killed, is a heavily populated urban center. Also weighing against a change of venue were the third and fourth factors – the prominence of the defendant and the victim – for the record contains no evidence that here either defendant or the victim was widely known in the community.

With respect to the fifth and final factor – the nature and extent of the publicity – the media reports about the case contained highly prejudicial information: the death sentence that defendant received for the 1965 murder, and the death sentence, later reversed on appeal, that defendant initially received for killing store owner Naumoff. The record, however, contains no evidence that a substantial portion of the community was aware of these reports.

The responses given by the prospective jurors at voir dire provide further evidence that the pretrial publicity had no prejudicial effect on defendant's right to a trial by a fair and impartial jury. Two prospective jurors mentioned that they had seen the television program in question, and one recalled reading about defendant in the

ballot pamphlet; all three were excused. Several prospective jurors recalled hearing about the killing when it first occurred in 1979, but none of them remembered anything about defendant or his prior criminal history. A few others had read columnist Herb Caen's statement in the San Francisco Chronicle that he had been subpoenaed to testify in connection with one of defendant's motions to dismiss the case because of pretrial publicity. (Caen did not mention defendant's record or the facts of the case.) An overwhelming majority of the prospective jurors questioned knew nothing about the case. Thus, the trial court correctly concluded that the pretrial publicity regarding defendant's case would not prevent a fair trial in San Francisco County.

**E. Jury Venire**

Defendant unsuccessfully moved to quash the panel of prospective jurors from which his jury was selected, asserting that Blacks, Hispanics, women, youths, prospective jurors with high school or less education, and blue collar workers were underrepresented on the panel, and that his jury was therefore not selected from a fair cross-section of the community. The motion was based on the records of motions in three other criminal cases that challenged jury selection procedures in San Francisco County (*People v. White* (Super. Ct. San Francisco County, 1991, No. 117535), *People v. Thompson* (Super. Ct. San Francisco County, 1991, No. 124613), and *People v. Henderson* (Super. Ct. San Francisco County, 1986, No. 109544))[6]

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[6] We take judicial notice of the files in these three cases.

and on brief testimony offered by Dr. Linda Meza, a psychologist involved with the National Jury Project. Abandoning most of these claims, defendant now argues that the trial court should have granted the motion on the ground that Blacks and Hispanics were underrepresented on his jury panel, in violation of the Sixth and Fourteenth Amendments to the federal Constitution and article I, section 16, of the California Constitution.

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (*Duren v. Missouri* (1979) 439 U.S. 357, 364.) Defendant satisfies the first of these requirements: our cases hold that both Blacks and Hispanics qualify as "distinctive" groups for purposes of the fair-cross-section requirement. *People v. Bell* (1989) 49 Cal.3d 502, 526 [Blacks]; *People v. Ramos, supra,* 15 Cal.4th at p. 1154 [Hispanics].) We need not determine, however, whether defendant has complied with the second requirement (showing that Blacks and/or Hispanics are underrepresented), because he has not met the third requirement: a showing that any underrepresentation is the result of systematic exclusion of the particular group in the jury selection process.

A defendant cannot establish a prima facie case of systematic exclusion of a distinctive group merely by

presenting statistical evidence that the group is underrepresented in the jury pool, venire, or panel.[7] Rather, the defendant must show that the underrepresentation "is the result of an improper feature of the jury selection process." (*People v. Howard, supra,* 1 Cal.4th at p. 1160; see also *People v. Bell, supra,* 49 Cal.3d at pp. 528-529.) Here, defendant has presented no evidence describing the manner in which jury pools, venires, and panels were created in San Francisco in November 1988, when jury selection in his case began. True, the records of the three San Francisco Superior Court cases mentioned above, which were considered by the trial court in this case, contained evidence describing the manner in which this process had occurred in previous years. But defendant has offered no evidence that the process operated in the same manner at the time of his trial. As a result, he has not shown that the jury selection process contained any "improper features." (*People v. Howard, supra,* 1 Cal.4th at p. 1160.)

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[7] "The jury 'pool' is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A 'venire' is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a 'panel.' A 'panel' is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case." (*People v. Bell, supra,* 49 Cal.3d at p. 520, fn. 3.)

## III. DISPOSITION

The judgment is affirmed.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.
MOSK, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
BROWN, J.

(2)

Supreme Court, U.S.
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No. 98-1475

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998

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ROBERT LEE MASSIE, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

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## QUESTIONS PRESENTED -- CAPITAL CASE

1. "Has jeopardy attached for purposes of the Fifth and Fourteenth Amendments where a capital defendant's guilty plea has been unconditionally accepted and entered by the trial court, sentence has been pronounced, and the condemned has been confined for several years awaiting execution pursuant to the sentence?" Pet. at i.

2. "Is a defendant subjected to double jeopardy pursuant to the Fifth and Fourteenth Amendments where (i) he pleads guilty to felony murder and is sentenced to death by a court with undisputed jurisdiction over the crime and his person, (ii) his conviction is then reversed on state law grounds in a state-initiated automatic appeal which he was denied the right to terminate in state and federal court, and (iii) he is tried a second time on the same information for the same felony murder?" Pet. at i-ii.

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998
No. 98-1475

---

ROBERT LEE MASSIE, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

---

## OPINION OR JUDGMENT BELOW

Petitioner Massie seeks review of the November 30, 1998, published opinion of the California Supreme Court in *People v. Massie*, 19 Cal.4th 550, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998), affirming 1989 judgments of conviction and death. The California Supreme Court opinion is attached as petitioner's Appendix to his Petition for Writ of Certiorari.

## STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies upon the Fifth Amendment, and section 1 of the Fourteenth Amendment to the United States Constitution. These provisions are set forth in the petition at pages one and two.

## STATEMENT OF THE CASE

"On January 3, 1979, petitioner Robert Lee Massie shot and killed Boris Naumoff, the proprietor of a San Francisco liquor store. Massie was arrested two days later." Pet. at 5.

By information filed February 20, 1979, in the San Francisco County Superior Court, the district attorney charged petitioner with the murder, Cal. Pen. Code § 187, and robbery, *id.* at § 211, of Boris Naumoff. (Hereinafter, unless otherwise specified, all statutory references are to the California Penal Code.) The information also charged petitioner with one count of assault with a deadly weapon, § 245, two counts of robbery, § 211, and four counts of possession of a firearm by a convicted felon, § 12021. The information lastly alleged the following two special circumstances attendant to the murder charge: prior murder, § 190.2(a)(3); and robbery murder, § 190.2(a)(17)(i).

On May 8, 1979, just prior to the scheduled beginning of petitioner's trial, he withdrew his not guilty plea and, without his counsel's consent, pleaded guilty to all charges and allegations, including the special circumstances. Following a court penalty trial at which petitioner represented himself, the trial court sentenced him to death on May 25, 1979. An automatic appeal to the California Supreme Court followed pursuant to section 1239(b).

Counsel represented petitioner on appeal. During its pendency, petitioner personally sought to dismiss the appeal. After the state high court denied petitioner's request, he immediately sought habeas relief in the federal courts, 28 U.S.C. § 2254, arguing that his Sixth Amendment right to self-representation entitled him to dismiss his appeal. The federal courts also disagreed, and denied relief. *Massie v. Sumner*, 624 F.2d 72 (9th Cir.

1980), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981).

On December 23, 1985, the California Supreme Court reversed petitioner's convictions for the murder and robbery of victim Naumoff and the associated special circumstances under authority of *People v. Chadd*, 28 Cal.3d 739, 170 Cal.Rptr. 798, 621 P.2d 837 (1981), *cert. denied*, 452 U.S. 931, 101 S.Ct. 3066, 69 L.Ed.2d 431. The court held that a "defendant's guilty plea to a capital offense against the advice of counsel cannot be permitted to stand." *People v. Massie*, 40 Cal.3d 620, 625-26, 221 Cal.Rptr. 140, 709 P.2d 1309 (1985). The California Supreme Court directed the trial court "to strike from its records defendant's pleas of guilty and his admission of charged enhancements and special circumstances allegations." *People v. Massie,* 40 Cal.3d at 626.

Following remand, petitioner, on October 20, 1986, moved to dismiss on grounds of double jeopardy. His basic argument, as it is here, was that since he did not consent to the state supreme court's reversal of his initial judgment, retrial was without legal necessity. The trial court denied the motion on November 12, 1986. On January 20, 1987, the California Court of Appeal summarily denied petitioner's pretrial petition for writ of prohibition/mandate seeking to prevent retrial on double jeopardy grounds. The California Supreme Court denied review on March 5, 1987.

Petitioner then sought pretrial relief on his double jeopardy claim in federal court by way of a petition for writ of habeas corpus. 28 U.S.C. § 2254. On December 27, 1988, the district court denied the habeas petition. The Ninth Circuit Court of Appeals affirmed the district court's denial by way of a published decision on May 23, 1989. *See Massie v. Hennessey*, 875 F.2d 1386, 1387-88 (9th Cir. 1989). This Court denied certiorari on March 19, 1990. *Massie v. Hennessey*, 494 U.S. 1039, 110 S.Ct. 1504, 108 L.Ed.2d 639 (1990).

Meanwhile, trial had begun on October 3, 1988, with in limine motions. The trial court impanelled a jury on January 12, 1989. On February 19, 1989, the jury found petitioner guilty of murder and robbery with personal use of a firearm, and found true the robbery-murder special circumstance. The jury returned a true finding on the prior murder special circumstance on February 22, 1989. Following a penalty phase trial, the jury returned a verdict of death on March 30, 1989.

On June 8, 1989, the trial court denied petitioner's motion to modify the verdict pursuant to section 190.4(e), and sentenced him to death.

Petitioner filed his appellant's opening brief in the subsequent automatic appeal, § 1239(b), on December 2, 1995; the People filed their respondent's brief on March 13, 1996; and appellant filed his reply brief on May 22, 1996.

Petitioner filed a state petition for a writ of habeas corpus on August 20, 1996, essentially reiterating his direct review arguments. Petitioner filed a second state petition for a writ of habeas corpus on April 11, 1997.

As noted earlier, on November 30, 1998, the California Supreme Court issued an opinion affirming the judgments of conviction and death.

On December 15, 1998, the California Appellate Project, as amicus curiae, applied for permission to file a brief in the California Supreme Court in support of rehearing.

On January 13, 1999, the California Supreme Court denied the state petitions for a writ of habeas corpus.

On January 27, 1999, the California Supreme Court denied the California Appellate Project's request to file a brief in support of rehearing, and refused to grant rehearing on its own motion.

On February 19, 1999, Justice O'Connor extended petitioner's time within which to file a petition for a writ of certiorari up to and including March 15, 1999.

On March 15, 1999, petitioner filed the instant petition for writ of certiorari from the affirmance of the judgments on his state direct appeal.

## SUMMARY OF ARGUMENT

The crux of petitioner's argument is that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution barred his 1989 capital jury trial for the murder of Boris Naumoff. Petitioner reasons as follows: (1) former jeopardy attached at the time of his purported guilty plea to capital charges in 1979; (2) he never consented to having that plea set aside on automatic appeal in 1985, but instead had personally sought to dismiss that appeal; and, therefore, (3) double jeopardy prevented his 1989 retrial following reversal.

While petitioner's argument contains lengthy double jeopardy analysis, he assumes that former jeopardy attached at the time he attempted to plead guilty to capital charges without his attorney's consent. As the California Supreme Court correctly held, that premise is false. And even if the state high court incorrectly so held, under the circumstances of this case, this Court should not grant certiorari to remedy the state court's mistake.

Any possible error could not have prejudiced petitioner. Assuming, arguendo, that jeopardy attached at petitioner's 1979 proceedings, his 1989 trial and conviction did not violate double jeopardy. It is black-letter law that the government may retry a defendant, without running afoul of the Double Jeopardy Clause, after a successful appeal. That is essentially what happened here, and the fact that the state appeal which led to the 1985 reversal of petitioner's 1979 judgment was one which state law did not permit petitioner to waive, is not a fact which takes this case out of the general rule permitting retrial after appellate reversal. Automatic state capital appeals which are unwaivable and where state law further forbids self-representation, are constitutional.

## ARGUMENT

### PETITIONER HAS PRESENTED NO REASON FOR CERTIORARI

Petitioner believes that the 1989 capital retrial violated his double jeopardy rights. He also believes the California Supreme Court erred in holding that the retrial did not implicate double jeopardy concerns given that petitioner entered an *invalid* guilty plea in 1979, and therefore jeopardy never attached at that time.

> Ordinarily, jeopardy attaches when a defendant enters a plea of guilty, or when the court imposes sentence following the entry of that plea. (See, e.g., *Dawson* v. *United States* (7th Cir. 1996) 77 F.3d 180, 182; *United States* v. *Faber* (9th Cir. 1995) 57 F.3d 873, 875; *United States* v. *Santiago Soto* (1st Cir. 1987) 825 F.2d 616, 618-619; *United States* v. *Felton* (3d Cir. 1985) 753 F.2d 276, 278; *United States* v. *Cambindo Valencia* (2d Cir. 1979) 609 F.2d 603, 637.) Jeopardy does not attach when the plea is invalid, however. "[A]n unlawful guilty plea is null and therefore does not bar a second prosecution for the same offense. Thus, if a court lacks jurisdiction to accept defendant's plea or if the plea violates any statute, then the plea and sentence will not bar reprosecution." (22 C.J.S. (rev. 1989) Criminal Law, § 223, p. 272.) We know of no authority to the contrary.
>
> This case is analogous to *Cox* v. *State* (Fla. 1982) 412 So. 2d 354. There, the trial court, over the prosecutor's objection, accepted a defendant's plea of guilty to a lesser offense included within the crime charged. On an

> appeal by the prosecution, the Florida Supreme Court invalidated the guilty plea, holding that under Florida law the trial court could not accept such a plea without the prosecutor's consent. The court also held that because the guilty plea was invalid, jeopardy had not attached, and the state could again prosecute the defendant without violating the federal Constitution's prohibition against double jeopardy. (*Id.* at pp. 355-356; see also *Bayless* v. *United States* (8th Cir. 1945) 147 F.2d 169, 170.) Here, too, as explained earlier, defendant's guilty plea was invalid. Thus, as in *Cox*, jeopardy did not attach upon entry of the invalid guilty plea. Therefore, the prosecution could try defendant for the murder of store owner Naumoff.

*People v. Massie*, 19 Cal.4th at 563-64, fn. omitted.

## A. The California Supreme Court Decision Is Not Truly In Conflict With Any Other Decision

A well established ground for granting certiorari is the existence of a conflict on an important federal question between the challenged decision and a decision of this Court. Sup. Ct. Rule 10. Here, petitioner believes the state ruling that jeopardy does not attach to a guilty plea invalid under state law stands in conflict with "numerous decisions of this Court," and with decisions of "the circuits, and the state courts of last resort, which hold that jeopardy attaches when a guilty plea is unconditionally accepted before a tribunal with jurisdiction over the crime and the defendant's person." Pet. at 12.

As petitioner points out, *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), and *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), hold that jeopardy attaches in a trial based upon

an invalid indictment. This is because in such a situation the trial court has jurisdiction over the parties and cause, and therefore the judgment premised upon the invalid indictment is merely voidable, not void. Accordingly, as noted, jeopardy attaches.

As petitioner points out, in *People v. Superior Court (Marks),* 1 Cal.4th 56, 2 Cal.Rptr.2d 389, 820 P.2d 613 (1991), the California Supreme Court found an attachment of jeopardy where the trial court had proceeded, without "jursidiction" to do so, in the absence of a hearing on the defendant's competence. The California Supreme Court held that, for purposes of double jeopardy analysis, the crucial distinction was between a "fundamental loss of jurisdiction," i.e., "'an entire absence of power to hear or determine the case, an absence of authority over the subject matter of the parties,'" and "an inability to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.'" 1 Cal.4th at 66. A "fundamental" loss of jurisdiction was necessary to prevent the attachment of jeopardy, and none had occurred. *Id.* at 70-71.

Petitioner claims that *Ball, Benton,* and *Marks* make clear that that the attachment of jeopardy is not dependent upon the validity of the judgment under state law, but upon whether the trial court had "fundamental" jurisdiction over the proceeding in which the judgment was returned (authority over the subject matter and parties). As long as the latter exists, jeopardy attaches, petitioner states, irrespective of the former. Petitioner claims the California Supreme Court ignored *Ball, Benton* and *Marks* in his case. Petitioner states that while his guilty plea may have been invalid because the trial court had no power to accept it, since the court had jurisdiction over him and the subject, his judgment was simply "voidable", not "void," and for double jeopardy purposes, jeopardy attached.

To justify a grant of certiorari, the conflict between the lower court and this Court must be truly direct and must be readily apparent from the lower court's rationale and result. That is not this case. The California Supreme Court is correct in finding that, with respect to its holding that jeopardy does not attach to an invalid guilty plea, "there is no authority to the contrary." *People* v. *Massie,* 19 Cal.4th at 564. None of the cases petitioner relies on involve guilty pleas; meanwhile, as the *Massie* court noted, both the Florida Supreme Court in *Cox* and a leading treatise hold that jeopardy does not attach to an invalid guilty plea.

Because the present case involved an invalid guilty plea, not an invalid indictment (*Ball, Benton*), or a judgment invalid in another respect (*Marks*), this Court should not exercise its discretion to grant certiorari. Distinguishable cases create no "conflict."

There must be a real or "intolerable" conflict on the same matter of law, not merely an apparent inconsistency in the general principles involved. *Layne and Bowler Corp. v. Western Well Works Inc., et al.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923).

**B. Notwithstanding Any Apparent Conflict, The Issue Raised By It Is Not Of Substantial Importance**

This Court's certiorari review is discretionary and depends on numerous factors other than the perceived correctness of the judgment it is asked to review. *Ross v. Moffit*, 417 U.S. 600, 616-617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Indeed Rule 10 of the United States Supreme Court Rules of Court makes clear that this Court, in exercising its discretion on certiorari, looks to see whether the issues are of substantial importance.

Here, petitioner asks this Court to grant certiorari to hold that like an invalid indictment, a judgment stemming from an invalid guilty plea is "merely voidable," not void at its inception, and thus protected by the Double Jeopardy Clause.

This is not an important issue. At most the California Supreme Court below incorrectly applied the general principles surrounding "jurisdiction" and "void" and "voidable" judgments. Few people, apart from petitioner, will be affected by resolution of the question. This case turns on its own special facts and circumstances and is of concern primarily to the parties. Certiorari is in order only when the issue is of importance to the public, as opposed to the parties. *Hallanan v. Eureka Pipe Line Co.*, 261 U.S. 393, 43 S.Ct. 414, 67 L.Ed. 715 (1923).

It is also well established that this Court does not concern itself with issues that are not "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed 897 (1955). As will now be shown, that is this case. Whether jeopardy attached at the time petitioner entered his invalid guilty plea in 1979 is purely an academic question. Resolution of it in petitioner's favor garners him no relief.

### C. Even If Jeopardy Attached To Petitioner's 1979 Guilty Plea, The 1989 Retrial Did Not Violate Double Jeopardy Principles

Petitioner, in asking this Court to grant certiorari and reverse the California Supreme Court, invites this Court to hold that his 1989 retrial ran afoul of the Double Jeopardy Clause. This Court need not grant certiorari to determine whether jeopardy attached for petitioner in 1979 because even if it did, the Double Jeopardy Clause properly did not prohibit his 1989 trial.

Petitioner argues that his 1989 retrial "was barred by the Double Jeopardy Clause," and asserts that "the California Supreme Court, led astray by its erroneous conclusion that jeopardy did not attach in Massie's 1979 trial, never reached that point in the analysis." Pet. at 22. Petitioner suggests that this Court's double jeopardy jurisprudence compels the conclusion that his 1989 retrial constituted a double jeopardy violation, and he intimates that this Court should grant certiorari to remedy that violation. Pet. at 22-26.

First, this Court's double jeopardy jurisprudence does not compel the conclusion that petitioner's 1989 retrial constituted a double jeopardy violation. Second, while the California Supreme Court held that jeopardy did not attach at petitioner's 1979 proceedings, petitioner ignores the fact that the state high court did review and correctly reject many of the arguments upon which petitioner's double jeopardy claim is premised.

**1. Petitioner's Situtation Falls Within The Rule That The Double Jeopardy Clause Does Not Bar Retrial After Appellate Reversal**

The law has long provided that the government may retry a defendant, without running afoul of the Double Jeopardy Clause, after the defendant has appealed and obtained a reversal.

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that

> reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

*United States v. Tateo*, 377 U.S. 463, 466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

Petitioner ignores here that the United States Court of Appeals for the Ninth Circuit, in a case this Court refused to review and which no decision of this Court contradicts, has already held that petitioner's situation falls within the well-settled rule reiterated in *Tateo*.

In *Massie v. Hennessey,* 875 F.2d 1386, *cert. denied*, 494 U.S. 1039, 110 S.Ct. 1504, 108 L.Ed.2d 639, the Ninth Circuit noted first that the Double Jeopardy Clause consists of three separate constitutional protections: it protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishment for the same offense. *Id.* at 1388 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The Ninth Circuit then noted that this Court has explained that the Framers designed the Double Jeopardy Clause "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Massie v. Hennessey, supra*, 875

F.2d at 1388 (quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The *Massie v. Hennessey* court noted third that while a primary purpose of the Double Jeopardy Clause is to preserve the finality of judgments, "the 'pronouncement of sentence has never carried the finality that attaches to an acquittal.'" 875 F.2d at 1389 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 133, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980)). "A defendant 'is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.'" *Id.*

> Here, Massie could have no expectation of finality upon sentencing, where California provides for a mandatory appeal upon imposition of a death sentence, even though he challenged that appeal.
>
> The Supreme Court recognizes that the death penalty is different from any other punishment imposed under our system of criminal justice. Because of the uniqueness of that penalty, the Court has held that death cannot be imposed under circumstances where there is a substantial risk that it would be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Court has also stated that a statutory scheme that provides for the automatic appeal of all death sentences is an important safeguard against arbitrariness and caprice. *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).
>
> In line with *Furman* and *Gregg*, California has a concern for ensuring against arbitrariness and caprice in a murder conviction and

> imposition of the death sentence. This most important concern must override any double jeopardy objection Massie may have. This court held previously that the State of California constitutionally may require a higher court review of the death sentence and conviction. *Massie*, 624 F.2d at 74. We observed that in California, the courts have recognized that they have a duty to conduct such a review, which they cannot avoid or abdicate. *Id.* at 73-4. The California Supreme Court's decision upon mandatory appeal in *Massie*, that a trial court cannot accept a guilty plea against the advice of counsel in a capital case, reflects that State's concern that the death penalty be imposed in accordance with the Constitution.

*Massie v. Hennessey, supra*, 875 F.2d at 1388-89.

The *Massie v. Hennessey* court then ruled that Massie's situation falls within the general rule that an appeal from a judgment of conviction constitutes a waiver of a double jeopardy defense, despite the fact that Massie had attempted to waive his mandatory appeal.

> We reject Massie's argument that because he objected to the mandatory appeal he did not waive the double jeopardy defense. We agree with the California Supreme Court's observation in [*People v.*] *Powell*[,] [40 Cal.App.3d 107, 115 Cal.Rptr. 109 (1974)], that the mandatory appeal is of substantial benefit to defendant and to society regardless of the attempt to waive it, and that "[i]t is not logical that its provisions should operate to the benefit of the accused and to the detriment of society." *Powell,* 40 Cal.App.3d at 143 . . . The appeal is fairly characterized as Massie's even though it is mandatory, and his

> waiver of any defense of double jeopardy must be implied by operation of law.

*Massie v. Hennessey*, 875 F.2d at 1389.

The *Massie v. Hennessey* court concluded that because the appeal *was petitioner's*, the double jeopardy guarantee of the Fifth Amendment imposed no limitation on the power to retry him. The court held in accordance with the general rule that to require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset the first conviction "'is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'" 875 F.2d at 1389 (quoting *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)).

Petitioner asserts that the above analysis fails because it rests upon this illogic: that the automatic appeal provision for capital defendants in California can be considered the "defendant's appeal" when, as here, the defendant Massie did not want it.

Below, the California Supreme Court held that *People v. Stanworth*, 71 Cal.2d 820, 80 Cal.Rptr. 49, 457 P.2d 889 (1969), the case wherein it originally held that California legitimately forbids capital defendants from waiving their appeals, was not wrongly decided and declined petitioner's invitation to overrule it. The *Massie* court noted that not permitting a capital defendant to waive the automatic appeal provided by section 1239(b) is consistent with the legislative purpose behind the statute. *People v. Massie, supra*, 19 Cal. 4th at 566-67. And, the court held:

> We decided *People* v. *Stanworth, supra*, 71 Cal.2d 820, almost 30 years ago. Since then, the Legislature has reenacted section 1239 (Stats. 1982, ch. 917, § 4, p. 3355) and has amended it on two other occasions (Stats. 1975, ch. 1125, §

> 3, p. 2744; Stats. 1988, ch. 551, § 1, p. 2013), but it has never altered section 1239's requirement that "[w]hen . . . a judgment of death is rendered, an appeal is automatically taken by the defendant." The quoted phrase forms the basis for *Stanworth's* holding that an appeal of a judgment of death may not be waived. "'When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.'" (*People* v. *Ledesma* (1997) 16 Cal.4th 90, 100-101 [65 Cal.Rptr.2d 610, 939 P.2d 1310], see also *Robinson* v. *Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235 [5 Cal.Rptr.2d 782, 825 P.2d 767] ["In the absence of legislative history suggesting otherwise, there is a very strong presumption that the Legislature intends that the same construction be given statutory language which has been readopted without change."].)

*People v. Massie, supra*, 19 Cal.4th at 567-68.

Contrary to petitioner's urgings here, Pet. at 23, n. 4, the automatic appeal provisions for capital defendants in California, § 1239(b), are not violative of the federal Constitution.

In arguing that the automatic appeal provisions violate his Sixth and Fourteenth Amendment rights to control his own defense, petitioner relies primarily on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which holds that a criminal defendant has the right of self-representation at trial. However, "'"*Faretta* does not purport . . ." . . . to abrogate the rule . . . that a capital defendant has no right to waive his automatic appeal.'" *People v. Massie*, 19 Cal.4th at 570

(quoting *People v. Massie*, 40 Cal.3d at 624). The state high court also properly rejected the reliance petitioner renews here upon this Court's decision in *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

> Defendant points to isolated comments in federal cases that were decided after our decision in *Massie I* and state that a defendant has the right to decide whether to appeal. (See *Jones* v. *Barnes* . . . 463 U.S. 745, 751 ["[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his own behalf, *or take an appeal*. . . ." (Italics added.)]; *Marrow* v. *United States* (9th Cir. 1985) 722 F.2d 525, 530 ["The decision whether to appeal 'must be the defendant's own choice,' . . . even after a guilty plea. . . ."].) We do not view these passing remarks, taken out of the context in which they arose in noncapital cases, as establishing a rule that a capital defendant who has been sentenced to death has a constitutional right to waive an automatic appeal.

*People v. Massie*, 19 Cal.4th at 570.

In asking this Court to grant certiorari to declare the automatic appeal provision of section 1239(b) unconstitutional as violative of the Sixth and Fourteenth Amendments, petitioner ignores the fact that there is no federal constitutional right to an appeal. *McKane v. Durston*, 153 U.S. 684, 687-88, 14 S.Ct. 913, 38 L.Ed 867 (1894). Although if, as here, a state has provided for direct appellate review as a matter of right, the state must appoint counsel for indigent defendants on the first appeal, *Douglas v. California*, 372 U.S. 353, 356-57, 83 S.Ct. 814, 9 L.Ed. 811 (1963), that constitutional right to counsel on appeal is not based on the Sixth Amendment.

Rather, *Douglas* premised its holding on Fourteenth Amendment due process and equal protection principles.

> [A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

*Douglas v. California, supra*, 372 U.S. at 356-57, citations omitted, original italics.

Since due process is predicated on *fundamental fairness*, *Ross v. Moffitt*, 417 U.S. at 608-09; *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 10 L.Ed.2d 100 (1990), the automatic appeal statute for capital defendants in California, and its concomitant rule that a capital appellant has no right to waive the appeal or seek self-representation, do not violate due process. The automatic appeal and the forbidding of waiver or self-representation promotes fairness in that it promotes the state's interest in ensuring that the capital appellant is afforded a fair and effective appeal. That, of course, insures that the capital appellant received a fair trial and reliable penalty determination.[1]

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1. This Court in *Faretta* observed that in *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), the holding that a convicted person had no absolute right to argue his or her own appeal, "was in 'sharp contrast' to his 'recognized privilege of conducting his own defense at the trial.'" *Faretta v. California, supra*, 422 U.S. at 816 (citation omitted).

Because California's automatic appeal for capital defendants, along with the corollary rules forbidding waiver and denying self-representation on appeal, do not in any way impair the fairness of the appellate process, they do not violate due process.

Likewise, the fact that California does not provide an automatic appeal for non-capital appellants does not violate the equal protection rights of the capital appellants. As the California Supreme Court held below:

> Defendant further contends that section 1239(b), which prohibits this court from granting requests by defendants sentenced to death to dismiss their automatic appeals, violates his right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. We disagree. As we have explained, "the first prerequisite to such a claim is a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People* v. *Andrews* (1989) 49 Cal.3d 200, 223 [260 Cal.Rptr. 583, 776 P.2d 215], quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549], italics omitted.) Section 1239(b) applies to individuals who, like defendant, have been sentenced to death. Defendant fails to identify any other similarly situated group that is affected differently by section 1239(b).

*People v. Massie*, 19 Cal.4th at 570-71.

Because it is black-letter law that the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification which affects two or more *similarly situated* groups in an unequal manner, 2 Rotunda, Novak, Young,

*Treatise on Constitutional Law: Substance and Procedure* (1986) Introduction to Equal Protection, § 18.3, p. 317, petitioner can show no equal protection violation from California's refusal to extend the right to self-representation to appeal from trial. Criminal defendants at trial and criminal appellants are not similarly situated given the profound differences between the trial and appellate stages.[2/]

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2. There are "significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.' [Citation.] [¶] By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any

Given the constitutionality of section 1239(b), and the constitutionality of California's refusal to permit capital appellants to waive their appeals or even represent themselves, it follows that petitioner's appeal in 1979 *was his own*, not just the state's. Absent a showing of exceptional circumstances, petitioner was bound by the tactical decisions of his competent defense counsel, *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), and those tactical decisions led to a reversal. Because of the reversal, California legitimately retried petitioner in 1989 without violating the Double Jeopardy Clause.

**2. Because California's Mandatory Review Procedures In Capital Cases Occasioned Petitioner No Violation Of His Double Jeopardy Rights, The "Societal Interests" Served By That Procedure, Although Substantial, Were Not Deemed To "Outweigh Any Constitutional Protection**

Petitioner cites this Court's decision in *Burks v. United States*, 437 U.S. 1, 11, n. 6, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), for the proposition that "when the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Pet. at 24. This Court should reject petitioner's intimation that it needs to grant certiorari to prevent the state from using "societal interests" or "equities" to outweigh his double jeopardy rights.

This is not a case where petitioner has a legitimate double jeopardy defense that the courts have

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appeal at all. [Citation.]" *Ross v. Moffitt, supra*, 417 U.S. at 610-11.

refused to enforce on the ground that "societal interests" or "equities" outweigh it. Again, because the automatic unwaivable appeal of petitioner's 1979 guilty plea and death judgment was constitutional and suffered from no other legal infirmity, no double jeopardy violation arose from the state's 1989 retrial of petitioner. Petitioner's retrial fell under the general rule that double jeopardy does not bar retrial after a reversal on appeal. *United States v. Tateo*, 377 U.S. at 466.

Having said that, however, it is true that societal interests support the automatic, unwaivable appeal for capital defendants in force in California. One such convincing reason is expressed or implied in numerous death penalty cases decided by this Court. The punishment of death *is different. It can't be undone.* "In the 12 years since *Furman v. Georgia*, 408 U.S. 238 . . . , every member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, *and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense*." *Spaziano v. Florida*, 468 U.S. 447, 468, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens. J., dis. opn., fn. omitted, emphasis added). Because this Court has made clear that a state's death penalty laws, to pass constitutional muster, must guard against the imposition of the death penalty in an arbitrary and capricious manner, "the existence of an automatic appeal under state law is not a constitutional defect; it is a constitutional safeguard." *People v. Hill*, 3 Cal.4th 959, 1014, 13 Cal.Rptr.2d 775, 839 P.2d 984 (1992). That is, it protects against arbitrariness and capriciousness in the imposition of death sentences. Thus, not permitting a capital defendant to waive his or her appeal furthers constitutional values.

Furthermore, one of the principles underlying *Stanworth* and California's automatic, unwaivable, no self-

representation capital direct appeal process is that the State of California has an independent interest in the accuracy of the special circumstance and penalty determinations. That interest exists in all capital cases, not just where the defendant asserts it too.

When a court reviews a death sentence over a condemned prisoner's objections, it does so on the ground that society has an independent interest in the integrity of its institutions and its processes. By so doing, however, the court occasions no violence to the Double Jeopardy Clause.

### 3. The State Is Not Justifying Petitioner's Retrial On A "Continuing Jeopardy" Theory

In dissent, in *Kepner v. United States*, 195 U.S. 100, 134, 24 S.Ct. 797, 49 L.Ed. 114 (1904), Justice Holmes opined that "it seems to me logically and rationally that a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried."

> The jeopardy is one continuing jeopardy from the beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already has been tried once. But there is no rule that a man may not be tried twice in the same case. . . [¶] . . . [T]he prisoner . . . no more more would be put in jeopardy a second time because of a mistake of law in his favor, than he would be when retried for a mistake that did harm. It cannot matter that the prisoner procures the second trial.

*Kepner v. United States*, 195 U.S. at 134-35 (Holmes, J., dis. opn.).

This "continuing jeopardy" theory of Justice Holmes has never become the law. *Breed v. Jones*, 421 U.S. 519, 534, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). Petitioner is wrong in believing that the California Supreme Court's affirmation of the propriety of his 1989 retrial is essentially premised upon "continuing jeopardy." To repeat, because the automatic, unwaivable appeal of petitioner's 1979 guilty plea and death sentence was *petitioner's appeal* (as well as the state's) and was constitutional and suffered from no other legal infirmity, no double jeopardy violation arose from the state's 1989 retrial of petitioner. The 1989 retrial may have placed petitioner in jeopardy for a second time (not a first "continuing jeopardy"), but the Double Jeopardy Clause did not bar that retrial given the general rule that retrial is permissible after a reversal on appeal.

Petitioner asserts that the notion that his "double jeopardy claim fails because, in view of the automatic appeal provisions of California law, he had no expectation of finality in his conviction and sentence, is merely another way of phrasing the discredited continuing jeopardy theory." Pet. at 25, n. 5. Here petitioner is protesting the *Massie v. Hennessey* holding, in reliance upon *United States v.DiFrancesco*, 449 U.S. 117, that while a primary purpose of the Double Jeopardy Clause is to preserve the finality of judgments, "the 'pronouncement of sentence has never carried the finality that attaches to an acquittal.'" 875 F.2d at 1389. "A defendant 'is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.'" *Id.*

That holding does not constitute an application of the "continuing jeopardy" theory against petitioner. The *DiFrancesco* court held that in situations where a particular sentence does not represent an "acquittal" on any greater sentence, the double jeopardy clause does not bar statutory authorization of prosecutorial appeals of the

sentence. And, because the defendant was aware that his sentence was subject to appellate review, his legitimate expectations would not be defeated should his sentence be increased. Application of *DiFrancesco* to the present case is not inappropriate given that under the California death penalty statutes it is a conviction on the underlying murder charge and attendant special circumstances that triggers the penalty (sentencing) trial, and given that an illegal conviction can poison the reliability of a subsequent death *sentence* just as much as any penalty trial error. *See e.g., People v. Hale*, 44 Cal.3d 531, 244 Cal.Rptr. 114, 749 P.2d 769 (1988); *People v. Snow*, 44 Cal.3d 216, 242 Cal.Rptr. 477, 746 P.2d 452 (1987).

## CONCLUSION

Accordingly, for all of the foregoing reasons, the People of the State of California respectfully ask this Court to deny the petition for writ of certiorari.

Dated: April 13, 1999.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1998

ROBERT LEE MASSIE,

*Petitioner,*

v.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of California**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE
## LISTING OF PARTIES TO THE PROCEEDING

The caption to this case contains the names of all parties.

## RULE 29.6 STATEMENT

No corporations are parties to this case.

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## INTRODUCTION

According to the Attorney General, even if the California Supreme Court erred by deciding that jeopardy does not attach where a guilty plea is held invalid under state law on appellate review, the error is unimportant. The Attorney General claims Massie had no constitutional right to represent himself during his 1985 appeal, so the attorney forced on him by the state was "his" attorney. Since "his" attorney obtained the reversal of his conviction which led to his retrial, the argument goes, Massie had no double jeopardy defense to that retrial. Indeed, the Attorney General claims there is no constitutional impediment to California retrying Massie or any other capital defendant as many times as it wishes, whether or not the defendant wants to waive his appeal and assert his double jeopardy right to avoid a theoretically endless cycle of retrials.

On April 19, 1999 this Court granted certiorari in *Martinez v. Court of Appeal of California*, No. 98-7809, to decide the very issue upon which the Attorney General's argument depends: whether a criminal defendant has the constitutional right to represent himself on appeal. If there is such a right and Massie's "attorney" was unconstitutionally forced upon him in the 1985 appeal, then that attorney's conduct cannot be binding upon Massie. If the first appeal cannot reasonably be imputed to Massie, then the Attorney General's principal argument for why Massie's retrial was not barred by the Double Jeopardy Clause collapses.

Particularly in view of this Court's decision to grant certiorari in *Martinez*, this Court should grant this Petition as well in order to fully explain the degree of control which the Constitution requires that a criminal defendant be given over his appeal.[1]

## ARGUMENT

### A. THE CALIFORNIA SUPREME COURT'S DECISION IS IN CLEAR CONFLICT WITH NUMEROUS DOUBLE JEOPARDY DECISIONS OF THIS COURT, THE CIRCUITS, AND THE STATE COURTS OF LAST RESORT

The California Supreme Court held herein that jeopardy did not attach to Massie's 1979 felony murder conviction because the judgment was reversed in 1985 on the grounds that Massie's guilty plea was invalid under state law. The Petition demonstrates that the California Supreme Court's holding is in conflict with decisions of this Court, the Circuits, and the state courts of last resort in two ways: (1) the California Supreme Court applied state, not federal law, to determine when jeopardy attached; and (2) the attachment of jeopardy is not dependent upon the validity of the judgment, but rather the

[1] Since Massie would be required to overcome procedural barriers in order to argue that this Court's eventual decision in *Martinez* is applicable to his case on collateral review, *see* 28 U.S.C. § 2254(d), *Teague v. Lane*, 489 U.S. 288, 300-01 (1989), *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989), this Court should grant Massie's petition now, on direct review, in order to fully illuminate the important questions raised in *Martinez* and herein.

existence of risk, which is present when a guilty plea is unconditionally accepted by a court with subject matter and personal jurisdiction.

The Attorney General claims there is no conflict of authority because the cases establishing these principles did not involve guilty pleas which were invalid under state law. (Opp. at 10.)

But the Attorney General offers no reason why this distinction would change the analysis in any of the cases relied upon by Massie. This Court has plainly held that the attachment of jeopardy is not dependent upon the ultimate fate on appellate review of a court's judgment. "Jeopardy denotes risk," this Court wrote in *Breed v. Jones*, 421 U.S. 519, 528 (1975). "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price v. Georgia*, 398 U.S. 323, 331 (1970).

The California Supreme Court held that the superior court's error in exercising its jurisdiction prevented jeopardy from attaching to Massie's 1979 conviction and death sentence despite the superior court's unchallenged jurisdiction over the subject matter and Massie's person. This holding is in direct conflict with *Ball v. United States*, 163 U.S. 662, 669-70 (1896), *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), *Benton v. Maryland*, 395 U.S. 784, 796-97 (1969), *Boyd v. Meachum*, 77 F.3d 60, 65 (2nd Cir. 1996), *Block v. State*, 407 A.2d 320, 322, 324 (Md. 1979), and the other cases cited in Massie's Petition. (Pet. at 12-22.)

## B. THE ISSUES RAISED BY MASSIE'S PETITION ARE OF SUBSTANTIAL IMPORTANCE

Next, the Attorney General asserts that the issues presented by this Petition are not of substantial importance, and that the case "turns on its own special facts and circumstances." (Opp. at 11.) The Attorney General is wrong.

Like California, the courts of Florida, Alabama, Utah, and Arizona have held that the automatic appeal provided in capital cases by their state statutes cannot be waived by the defendant. *Klokoc v. State*, 589 So.2d 219, 222 (Fla. 1991); *Goode v. State*, 365 So.2d 381, 384 (Fla. 1978); *Evans v. State*, 361 So.2d 666, 667 (Ala. 1978); *State v. Holland*, 777 P.2d 1019, 1021-22 (Utah 1989); *State v. Brewer*, 826 P.2d 783, 789-91 (Ariz. 1992). Thus dozens, perhaps hundreds of cases could be affected by the Attorney General's assertion that there is no constitutional impediment to a non-waivable automatic appeal state trying a capital defendant for murder as many times as it wishes, even where the defendant has unequivocally asserted his double jeopardy rights and repudiated the automatic appeal.

Second, as the Petition notes, eighty to ninety percent of all criminal cases end in a guilty plea. (Pet. at 2.) If any of those defendants are subject to a second trial simply based upon appellate courts finding that their pleas were invalid under state law, the California Supreme Court's holding could affect, once again, dozens, if not hundreds of cases.

Third, following this Court's lead in *United States v. Smith*, 331 U.S. 469, 474-75 (1947), federal law and state

courts of last resort have long recognized that motions for new trials in criminal cases brought by the prosecution or granted *sua sponte* raise serious double jeopardy concerns. If the California Supreme Court's holding is correct, such motions raise no double jeopardy concerns at all if they are based upon arguments that the court's judgment is somehow void under state law. Thus, the California Supreme Court's holding could potentially affect thousands, if not tens of thousands of cases.

But most importantly, there is something deeply troubling about the Attorney General's offhanded dismissal of the significance of the California Supreme Court's erroneous holding. If the attachment of jeopardy is dependent upon what any state legislature chooses to label a "void" judgment, then the Double Jeopardy Clause means something different in each state. Had the events herein taken place in another state, jeopardy might have attached in 1979 and the Double Jeopardy Clause would bar Massie's retrial; but in California, jeopardy never attached, and Massie may be retried, convicted, and executed.

In *Benton v. Maryland*, 395 U.S. at 795-96, this Court held that the Double Jeopardy Clause is a protection so fundamental that it must apply equally everywhere, not only to federal but to state criminal convictions as well. It is far too late in the day to argue, as the Attorney General does here, that a holding which subjects the Double Jeopardy Clause to the whims of state legislatures is unimportant. The Petition presents issues of substantial importance.

## C. MASSIE'S RETRIAL CANNOT BE EXCUSED BASED UPON THE FICTION THAT THE 1985 APPEAL WHICH LED TO REVERSAL OF MASSIE'S FIRST CONVICTION WAS "HIS" APPEAL

The Attorney General claims that even if the California Supreme Court erred in finding that jeopardy did not attach to Massie's 1979 conviction and death sentence, the error was not prejudicial. Massie had no constitutional right to represent himself in his 1985 appeal, the Attorney General insists. (Opp. at 17, 19-22.) Therefore, the attorney forced upon Massie in connection with that appeal, which Massie tried to dismiss *in pro per* in state and federal court, was in reality "his" attorney arguing "his" appeal. (Opp. at 15-17.) As a result, the attorney's conduct in obtaining reversal of Massie's conviction "waived" Massie's double jeopardy rights, despite Massie's repeated assertion of those rights. (Opp. at 15-16.) Therefore, California may retry Massie or any other capital defendant on murder charges as many times as it wishes, even if the defendant vigorously asserts his double jeopardy rights and attempts to dismiss the coerced appeal.

This Court has rejected the notion that double jeopardy rights can be "waived" without any showing that the defendant has made a knowing, intelligent, and voluntary choice, properly labelling such coercive "waivers" as unconstitutional forfeitures. *Green v. United States*, 355 U.S. 184, 191-94 (1957).

But even if the Attorney General were correct in arguing that double jeopardy rights can be "waived"

through state coercion rather than voluntary choice, making a perpetual treadmill of retrials constitutionally permissible, his argument is based upon the proposition that the right of a criminal defendant to control his defense, if necessary by self-representation, established in *Faretta v. California*, 422 U.S. 806, 819-21, 834 (1975), does not extend to the defendant's appeal. If it does, the appeal conducted by the attorney forced upon Massie in 1985 cannot be "his" appeal, and Massie's retrial cannot be justified, as the Attorney General argues, by the proposition that there is no double jeopardy bar to retrying a criminal defendant who appeals and obtains reversal of his conviction.

This Court has agreed to decide whether a criminal defendant has a constitutional right to represent himself on appeal in *Martinez v. Court of Appeal of California*, No. 98-7809. Assuming such a right exists, which Massie believes it plainly does, the 1985 appeal conducted against Massie's will by the state-appointed counsel cannot be imputed to Massie and cannot justify his retrial.[2]

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[2] This Court will also consider related issues of a criminal defendant's right to control his appeal in *Smith v. Robbins*, No. 98-1037, pet. for writ of certiorari granted, March 8, 1999. *Smith* involves the issue of whether an appointed appellate counsel provides constitutionally ineffective assistance when he declines to raise issues on appeal which his client wants argued, instead filing a brief limited to a discussion of the facts and inviting the court to independently review the record for error. However, this Court's decision in *Smith* will not resolve the issues raised in this petition, because *Smith* involves the question of what happens when counsel refuses to raise *any* issues on appeal, despite his client's insistence. In this case, Massie's 1985 appellate counsel raised issues against Massie's

However, merely deciding the *Martinez* case will not fully illuminate the important issue of what degree of control the Constitution requires that a defendant be given over his appeal. This Court made it clear in *Faretta v. California*, 422 U.S. at 834, that the constitutional right to defend – to make the central decisions involved in the defense – and the constitutional right to represent oneself are two separate concepts, with the absolute right to defend including within it the more limited right to represent oneself. *See Adams v. United States*, 317 U.S. 269, 279-80 (1942) ("To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose . . . simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience"); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also Godinez v. Moran*, 509 U.S. 389, 399 (1993). Should this Court decide that the constitution requires that a defendant be permitted to represent himself on appeal, but decline to decide this case as well, the states will be free to strip the right to represent oneself on appeal of all meaning by denying the criminal defendant the right to make the central decisions involved in the appeal, such as when to dismiss it. Even if the Court decides that a criminal defendant has no constitutional right to represent himself on appeal, unless the Court decides this case as well the states will be free to conclude that the lack of a right to represent oneself

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will which involved a goal for the representation which Massie had specifically repudiated – reversal and a second murder trial. This Court should grant this petition as well in order to resolve this related, but distinct issue of a criminal defendant's constitutional right to control his appeal by determining the goals of that appeal.

necessarily means that the defendant can be stripped of any control over the appeal at all. Only by deciding both *Martinez and* this case may the Court fully settle the issues involved in this important area.

As a matter of California law, Massie had no control whatsoever over the 1985 automatic appeal. (Pet. at 23.) Acting *in pro per*, he was denied the right, both in state and federal court, to control that appeal by dismissing it. (Pet. at 6-10.) To argue that the appeal was nevertheless "his" appeal, resulting in the loss of his double jeopardy rights and exposing him to a theoretically endless cycle of involuntary retrials, is contrary to this Court's decisions in *Adams v. United States*, *Faretta v. California* and *Jones v. Barnes*.

## CONCLUSION

The California Supreme Court's decision is in direct conflict with numerous decisions of this Court and several Circuits and state courts of last resort. Particularly given this Court's orders granting certiorari in *Martinez v. Court of Appeal of California*, No. 98-7809 and *Smith v. Robbins*, No. 98-1037, this Court should grant the petition for writ of certiorari herein in order to fully explain the degree of control which the constitution requires that a criminal defendant be given over his appeal.

Respectfully submitted,

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